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THE INSTITUTES OF GAIUS

(*EXTRACTS*)

THE DIGEST. TITLE XLV.

1. DE VERBORUM OBLIGATIONIBUS

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THE INSTITUTES OF GAIUS

(EXTRACTS)

THE DIGEST. TITLE XLV.

1. De Verborum Obligationibus

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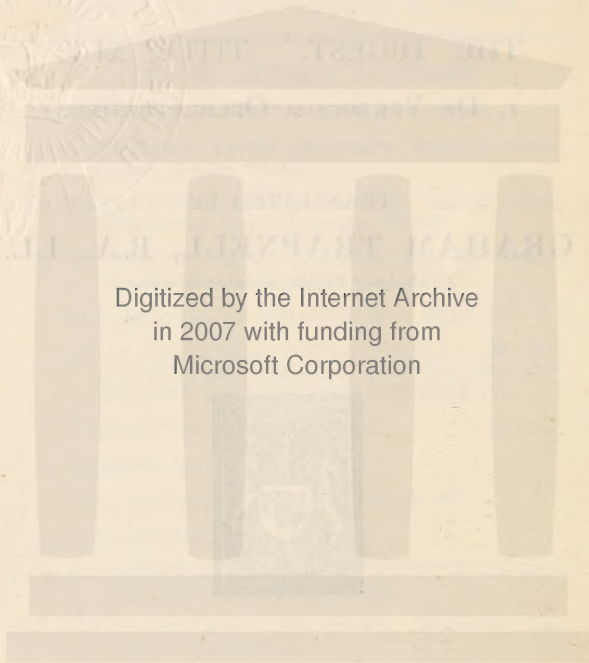
London
SWAN SONNENSCHEIN & CO. LIM.
NEW YORK: THE MACMILLAN CO.
1908



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THE INSTITUTES OF GAIUS

FIRST COMMENTARY

I. Concerning Civil Law and Natural Justice

1. All nations, that are governed by laws and customs, make use of a system which is partly of their own creation and partly based upon the general usages of mankind: and that part of their law which each community constructs for itself, and which is part of its national development, is distinguished by the name of civil law (*jus civile*[1]), in as much as it is the law peculiar to that state (*civitas*) itself; that part, however, which the dictates of natural justice have established amongst all mankind, is observed by almost all peoples, and is called the law of nations (*jus gentium*), in as much as it is made use of by every community. So the Roman people make use of laws that are partly peculiar to themselves and partly common to all nations.

. . . . . .

2. The Romans make their laws by statute (*lex*), by the vote of the commons (*plebiscitum*), by act of Senate (*senatus consultum*), by the decree of the Emperor (*constitutio principis*), by edicts promulgated by officials to whom the right to issue edicts (*jus Edicendi*[2]) is granted, and by answers of those learned in the law (*responsa prudentium*).

[1] *Jus civile* is here used in its wide sense and not in its narrower technical signification, where it is contrasted with and opposed to the *Jus honorarium*; the distinction between *Jus civile* and *Jus honorarium* arises out of the twofold division of Roman legal relations dependent on the distinctions of *Jus* and *Factum*. See note to *Dig.* XLV. 38, 6 *post*.

[2] See note to *Gai.* I. 6 *post*.

3. A statute (*lex*) is a law, ordered and determined by the nation (*populus*). A vote of the commons (*plebiscitum*) is one ordered and determined by the commons (*plebs*). The commons (*plebs*) differ from the people (*populus*), for under the name *populus* all the citizens are comprised, including patricians; but by the name *plebs* the citizens without the patricians are referred to: hence in times gone by the patricians used to maintain that they were not bound by votes of the commons (*plebiscita*), because they were passed without their assent; but in later times the Hortensian law (*lex Hortensia*) was passed, which enacted that the votes of the commons should be binding upon the whole nation; and so in this manner *plebiscita* were made equal to statutes (*leges*).

4. An Act of Senate (*senatus consultum*), is a law ordered and determined by the Senate; and it takes the place of a statute, although there was once some doubt on this point.

5. A decree of the Emperor (*constitutio principis*) is a law that the Emperor has determined by decree, by edict, or by a letter. And it was never doubted that such decrees took the place of statutes, for the Emperor himself has sovereign power (*imperium*) conferred upon him by statute.

6. The magistrates of the Roman people have the right to issue edicts (*jus Edicendi*). That right is conferred in the fullest extent upon the two praetors,[3] the city

[3] The praetors were the chief judicial officials in Rome. Originally there was only one praetor, but owing to the increase of commerce and the attendant increase of litigation between Roman citizens and foreign merchants, which involved a large addition to the praetorian duties, a second praetorship was created in 247 B.C. The original praetor was distinguished with the name of *Praetor Urbanus*, and his duties were primarily the administration of justice between litigants who enjoyed the privileges of Roman citizenship. The second praetor was called the *Praetor Peregrinus*, and his duties were confined to administering justice between aliens (*peregrini*) and between aliens and Roman citizens. The *jus Edicendi* was the power used by all the chief Roman magistrates, to issue public notices in reference particularly to the principles and rules they proposed to adopt in the administration of their office. The Prae-

praetor (*praetor urbanus*) and the foreign praetor (*praetor peregrinus*), and their jurisdiction in the provinces is exercised by the provincial presidents (*praesides*).

. . . . . .

7. The answers of those learned in the law (*responsa prudentium*) are the conclusions and opinions of those who are permitted to construe the laws. And if they all agree in one opinion, whatever they think and agree upon has the force of a statute (*lex*) ; but if they disagree the arbitrator (*judex*) [4] may follow whichever opinion he likes.

II. Concerning the Divisions of Law

8. All the law we use applies either to the rights, duties, and liabilities of persons, to the control of property, or to the regulation of procedure.

In the first place the rights, duties, and liabilities of persons must be considered.

III. Concerning the Status of Men

9. The chief subdivision of the law relating to persons is, that all men are either free or bond.

10. And of the former, some are born free (*ingenui*). while others are liberated from bondage (*libertini*) and so made free.

torian Edict, which largely concerned judicial practice and procedure, was the most important. In its earlier stages it was the means of extending the scope and usefulness of the judicial system, of giving it elasticity, and of reforming it from time to time ; and ultimately it became to some extent a code of practice and procedure which was adopted by each succeeding praetor with practically no change, and thus the methods of administering justice became certain, systematic, and well known.

[4] The *judex* was an official chosen by the parties to a civil suit and nominated by the praetor. In the *formula* of nomination the praetor clearly stated the issues of fact the *judex* had to try, and his decision was confined to those issues alone. He had not necessarily any legal training and was unpaid ; his functions were not unsimilar to those of a jury.

11. *Ingenui* are those that are born free ; *libertini* those who have been released from slavery.

. . . . . .

48. And there is another subdivision of the law relating to persons. For some persons are independent (*sui juris*), and some are subjected to control by others (*alieni juris*).

49. And of those who are *alieni juris* some are subject to *potestas* [5] ; others to *manus* [5] ; and others again to *mancipium*.[5]

50. Let us now investigate the condition of those who are

[5] The authority of the head of a household (*pater familias*) over the members of the household, including wife and children, adopted or natural, and their families and slaves, is described as the *potestas*, or sometimes *patria potestas*. Originally it was extensive and included rights of life and death over children and slaves and ownership of all their property ; it was subsequently modified to some extent, but it always amounted to the complete economic dependence of sons upon their fathers. It is curious that Roman youths should have submitted to a state of affairs that is so contrary to the natural desire for independence, especially in matters financial, that we are familiar with, and it has been suggested that its explanation is to be found in the fact that subjection to the paternal jurisdiction exempted the son from the complete civil extinction arising from *infamia* ; and when we remember that the risk of *infamia* was a constant one to Roman citizens *sui juris*, and that civic extinction deprived the Roman citizen of any chance of ever fulfilling his ambitions in life—which apparently all tended towards political position—we can understand why the burdensome control was tolerated. [See *Graeco-Roman Institutions*, by Dr Reich, and *Dig.* XLV. i. 38, 6, note *post*.] The exercise of the *potestas* was peculiar to Roman citizens, and the right to exercise it was lost when citizenship was lost. Its exercise was also terminated if a son was emancipated, or a daughter married, though in the latter case the woman exchanged the *potestas* of her father for that of her husband's father, or of her husband.

The jurisdiction of the husband over the wife in some cases amounted to *manus* ; it was somewhat analogous to the *potestas*, and included the right to all the woman's property and placed her in a similar position to a daughter under the *potestas* of a father.

Mancipium is used to describe the jurisdiction exercised over persons who had been subjected to a formal conveyance known as a *mancipatio*. This conveyance formed part of the process of adoption, and also was used in effecting a release from the parental *potestas*.

subjected to the control of others (*alieni juris*): and in order to understand who those persons are, we must at the same time know what persons are independent (*sui juris*).

51. First of all, let us inquire as to those subjected to *potestas*.

52. Slaves, for instance, are in the *potestas* of their lords. This *potestas* is a part of the law of nations (*jus gentium*); for amongst all peoples without exception it may be observed that power of life and death over slaves is conferred upon slave owners, and that whatever property is acquired through the slave is acquired on the master's behalf.

53. But at the present time neither Roman citizens, nor any other peoples, subject to the sway of Rome, are allowed to treat their slaves with excessive cruelty without excuse; for according to a constitution of the late Emperor Antoninus it is ordered that he who kills a slave of his own without justification is to be held liable for it, just as the man who has killed the slave of another is liable.

. . . . . .

54. Moreover, in as much as ownership (*dominium*) is of a twofold nature amongst Roman citizens [for a slave may belong to his owner as being in his possession (*in bonis*), or under quiritian right (*ex jure quiritium*); or according to both rights] a slave may be said to be in the *potestas* of his lord if he belongs to him *in bonis*, even though he does not at the same time belong to him *ex jure quiritium*: for whoever owns a slave by the bare *jus quiritium*, is not understood to have him subject to his *potestas*.

55. So too our children born in lawful wedlock (*justae nuptiae*) are in our *potestas*. And this right is peculiar to citizens of Rome (for there are scarcely any other men who exercise *potestas* over their sons just as we do) as is signified by the late Emperor Hadrian in an edict, which he promulgated concerning those who petitioned for Roman citizenship for themselves and their children. And I am not overlooking the fact that the people of Galatae consider children to be subject to the *potestas* of parents.

56. The Roman citizens are held to have contracted a

lawful marriage (*justae nuptiae*) and to have children born to them subject to their *potestas*, if they have married Roman women who enjoy the privileges of citizenship; or Latin or alien women with whom they have the right of legitimate marriage (*connubium*): for the effect of this right (*connubium*) is, that the children are born to the status of their father, so that, not only do they become citizens of Rome, but are also subject to the *patria potestas*.

. . . . . .

58. We are not permitted to marry every woman, for with certain of them marriage is prohibited.

59. For marriage cannot be contracted between those persons who are in the position of parents and children to each other, nor is there any legitimate right of marriage (*connubium*) between them, as for instance, between a father and daughter, or between a mother and son, or between a grandfather and granddaughter; and if such persons are united together, they are said to have contracted a nefarious and incestuous marriage. And so strictly is this rule applied, that, although the relationship of parent and child first arose from the fact of adoption, yet the parties cannot be united in marriage, and the same rule applies even after the relationship by adoption has been terminated; and so I cannot marry a woman who has, by adoption, become my daughter or my granddaughter, even though I may have emancipated her.

60. Between persons too who are collaterally related, a similar rule is observed, but not with the same strictness.

61. Marriage is certainly prohibited between a brother and sister, whether they were born of the same father and the same mother or whether only one or other of their parents was the same; and if a woman is my sister by adoption, so long as the tie of adoption continues, clearly no marriage can be consummated between us; but when that tie has been dissolved by emancipation, I can take her to wife; and if I have been emancipated, there will similarly be no bar to our marriage.

62. Marriage with the daughter of a brother is allowed [6]

[6] This was the only case of marriage with a niece that was recognised, and this recognition was withdrawn by Constantine.

and this practice first came into use when the late Emperor Claudius married Agrippina, his own brother's daughter; it is not, however, permissible to marry a sister's daughter. And these things are signified in the imperial decrees.

63. So too a man is not allowed to marry his paternal or maternal aunt. Nor is he allowed to marry a woman who has at some time been his mother-in-law or daughter-in-law, or his stepdaughter, or stepmother. And we say "at some time" because if the marriage still exists, by means of which such a relationship was created, there is another reason why the marriage cannot be, because the same woman cannot be married to two men nor can one man have two wives (at once).

64. Therefore if a man has contracted a nefarious or incestuous marriage, he is not considered to have either a wife or children: and those who are born from such a union are considered to have only a mother, and not to have a father, and therefore they are not in their father's *potestas*.

. . . . . .

97. But not only are children born in wedlock, according to what we have already said, in our *potestas*, but also those that we have adopted.

98. And there are two methods of carrying out adoption, for it is done either with the authority of the people (*populi auctoritate*) or under a magistrate's power (*imperio magistratus*), as for instance under the praetor's power.

. . . . . .

104. Women, however, cannot adopt children at all, because they do not have even those born to them subject to their *potestas*.

. . . . . .

107. In the method of adoption made by the authority of the people (*per populum*) there is this peculiarity—namely, that if a man whose children are subjected to his *potestas* has given himself in adoption (*adrogatio*), not only does he himself become subjected to the *potestas* of his adopted father (*adrogator*), but his children do so as well, just as if they were the grandchildren of the latter.

108. Let us now investigate the position of those who are

subjected to our *manus*. And this right too is peculiar to citizens of Rome.

109. Persons of both sexes are wont to be subjected to *potestas* ; but only women are subjected to *manus*.

. . . . . .

116. Finally we must explain what persons are subjected to *mancipium*.

117. All children, whether of the male or female sex, who are subject to their parents' *potestas*, can be alienated by the ceremony of *mancipatio*, in the same way as slaves.

118. The law is the same with regard to persons who are subjected to *manus*.

. . . . . .

124. Let us now inquire how those who are subjected to the control of others (*alieni juris*) get free of that restraint.

125. And in the first place let us investigate the matter with regard to those who are subjected to *potestas*.

. . . . . .

127. Now those who are subjected to the *potestas* of an ascendant become independent (*sui juris*) on his death. But this distinction prevails : when a father dies his sons and daughters always become independent (*sui juris*) ; but when a grandfather dies, his grandsons and granddaughters only become independent (*sui juris*), if after his death, they do not become subjected to the *potestas* of their father. And consequently, if it happens that when the grandfather dies their father is living and was subjected to his father's *potestas*, then after the grandfather's death the grandchildren become subjected to their father's *potestas* ; if, on the other hand, at the time of the death of the grandfather, their father was either dead or had ceased to be subject to his father's *potestas*, then, because those grandchildren cannot come under their father's *potestas*, they become independent (*sui juris*).

. . . . . .

132. Children also cease to be subjected to the parental *potestas* as a result of emancipation. The eldest son (*filius familias*) is released by the ceremony of *mancipium* three times performed, the other children, however, whether of

the male or female sex, require the ceremony performed once only.

. . . . . .

133. It must be pointed out, however, that he who has a son, and grandchild by that son, subject to his *potestas*, has his discretion unfettered, and may liberate the son from it, but retain the grandchild subject to it ; on the other hand he may retain the son subject to his *potestas*, and liberate the grandchild, or he may make all of them independent (*sui juris*). The same thing must be understood to apply to a great-grandchild.

134. In addition to this parents also cease to have subject to their *potestas* children that are given in adoption.

. . . . . .

138. Those who are subjected to *mancipium*, since they occupy the position of slaves, become independent (*sui juris*) when they have been released (*manumissi*) by *vindicta*,[7] by the census[8] (*censu*), or by a will[9] (*testamento*).

. . . . . .

142. Let us now turn to another division of the law relating to persons. For amongst those who are subjected neither to *potestas*, nor to *manus*, nor to *mancipium*, some may be controlled by tutors (*in tutela*), some by curators (*in curatione*), while some are controlled by neither. And therefore let us look into the position of those controlled by tutors, and those controlled by curators : for in that way we shall appreciate the position of that other group of persons, that is not under either of these restrictions.

[7] The method of enfranchisement from the state of *mancipium* described as by *vindicta* was carried out in the form of a trial before a magistrate. Someone on the slave's behalf touched him with a rod (*vindicta*) and claimed that he was a free man. His owner did not deny this and the slave was therefore declared free.

[8] Liberty to slaves was also sometimes given by the censor, who inscribed the slave's name in the census as a free man.

[9] Slave owners could bequeath slaves their liberty by their wills. There was ultimately a limit imposed on the number of slaves any one owner could release in this way, which varied according to the number of slaves he owned.

143. And we will concern ourselves first of all with those controlled by tutors.

144. Ascendants have the power to appoint tutors (*tutores*) by will, to act for those of their children that are subject to their *potestas*: with regard to male children only if they are under the age of puberty, but with regard to female children whether they be under or over that age, and even if they are married.

145. Hence if a man has appointed by his will a tutor to act for his son and for his daughter, and both have passed the age of puberty, the son ceases to be subject to the tutor, though the daughter, despite the fact that she has passed the age of puberty, remains under his control (*in tutela*).

. . . . . .

146. We can also appoint tutors by will for our grandsons and daughters, provided that after our death they do not become subjected to their father's *potestas*.

. . . . . .

148. For a wife, who is subjected to *manus*, a tutor may be similarly appointed, just as though she were a daughter, and for a daughter-in-law also, who is subject to the *manus* of a son, just as though she were a granddaughter.

. . . . . .

155. By the Law of the XII. Tables [10] (*lex XII. tabularum*) the agnates [11] (*agnati*), who are known as the statutory tutors (*tutores legitimi*), are appointed to act for those to whom no tutor has been nominated by will.

. . . . . .

164. But when the right to the tutorship (*tutela*) belongs to the agnates, it is not exercised by all of them at once, but only by those who are in the nearest degree of relationship.

165. By the same Law of the XII. Tables the tutelage (*tutela*) of freedwomen (*libertae*) and of freedmen (*liberti*)

[10] The Law of the XII. Tables was the earliest recorded written law of Rome; it was probably an attempt at codification of the then existing laws and customs.

[11] The agnates are those relatives who trace relationship through the male sex only.

under the age of puberty is exercised by their patrons (*patroni*) and their patrons' children; and this is also spoken of as a statutory tutorship (*tutela legitima*), not because it is expressly so enacted in that law in reference to such a tutorship, but because it has been accepted by interpretation, just as if it had been introduced by the words of the law itself: for the law ordains that the inheritance of freedmen and freedwomen who die intestate shall belong to their patrons or their patrons' children, and therefore it was held in days gone by that the law intended the guardianship (*tutela*) to belong to the same persons also, because in the case of agnate relations, those who were entitled to the inheritance were also ordered to undertake the duties of tutors as well.

. . . . . .

189. Those under the age of puberty are considered to be subject to tutelage (*in tutela*) by the law of all states; for it is in accordance with common-sense that a person who is not old enough to direct his affairs should be controlled by the tutorship of someone else, and there is scarcely any state in which parents are not permitted to nominate by their wills a tutor for those of their children that are under the age of puberty; although, as we have said above, only the citizens of Rome are considered to have their children so thoroughly subject to their *potestas*.

. . . . . .

193. Women are not subject to tutelage amongst foreigners, in the same way as they are with us; though in many cases they are under a kind of tutelage: as witness, for example, the law in use amongst the Bithynians, by which, if a woman makes a contract, she only does so with the authority of her husband, or that of one of his sons over the age of puberty.

194. Freeborn women (*ingenuae*) are liberated from tutelage if they shall have given birth to three children, and freedwomen (*libertinae*), if they are subject to the statutory tutorship (*tutela legitima*) of their patrons or their patrons' children, are released if they have given birth to four children; and as to other women, who have tutors of another kind, as, for instance, those known as

Atiliani, or *fiducarii*, they are freed from tutorship if they have given birth to three children.

195. And there are several ways in which a freedwoman can have a tutor of another kind, as for example, if she had been enfranchised by a woman; for then she ought to claim a tutor under the *lex Atilia*, or if she lived in the provinces, under the *lex Julia et Titia*; for the tutorship cannot be vested in her patroness.

195*a*. So too if she had been enfranchised by a man and had married (*facere coemptionem*) with his consent, and in consequence had been re-subjected to the *mancipium* and released, her patron ceases to be her tutor, and the man by whom she was released becomes her tutor, and he is called a *tutor fidicarius*.

196. As soon as male children reach the age of puberty, they are released from tutelage.

. . . . . .

SECOND COMMENTARY

1. In the previous commentary we have dealt with the rights, duties, and liabilities of persons ; let us now turn our attention to the law regulating property. We may consider property as either being part of our patrimony, or as being something apart from our patrimony.

2. The chief division of this branch of law is twofold ; for some property is held subject to divine control (*divini juris*), while other is regulated by the law of mankind (*humani juris*).

3. Property subject to divine control may be either sacred (*res sacra*) or holy (*res religiosa*).

4. Sacred things (*res sacrae*), are those consecrated to the heavenly gods ; holy things (*res religiosae*), are those dedicated to the shades of the departed.

5. Only that which has been consecrated by the authority of the Roman people is thought to be sacred, for instance, that which is consecrated by a law passed for that purpose or by an act of the senate (*senatus consultum*).

6. We can, however, dedicate a place as holy (*religiosum*) at our own discretion ; for example, by burying a dead man in our own land, provided only the duty of attending to his funeral rites has devolved upon us.

. . . . . .

8. Some things too that are described as sanctified (*sanctae*), such as walls and gates of towns, are in a measure subject to divine control (*divini juris*).

9. If property is subject to divine control, it does not belong to any individual (*nullius in bonis*) ; that however, which is regulated by the law of mankind (*humani juris*), is generally owned by someone, but it is possible for it not to belong to anyone ; for the property comprised

in an inheritance (*res hereditariae*), for instance, does not belong to anyone before someone exists as heir.

. . . . . .

10. Property which is regulated by the law of mankind (*humani juris*), may be either public or private property.

11. That which is public, is not considered to be in the ownership of anyone; for it is thought to belong to the community itself. Private property is that which each individual man owns.

12. Moreover, some property is corporeal, and some is incorporeal.

13. Things corporeal (*res corporales*) are those which are capable of being touched, as, for instance, land, a slave, a garment, gold, silver, and very many other things too numerous to mention.

14. Things incorporeal (*res incorporales*) are those which are not capable of being touched, and are such things as consist in rights conferred by law; as, for example, an heirship, a usufruct, and rights arising from contracts, however they be made. And this classification is not affected by the fact that the property comprised in an inheritance, and the products derived from a farm, may be things corporeal, or that what is owed to us under any contract is generally something corporeal, such as a farm, a slave, or money; for the right itself to the succession and the right itself to the use and profit of another's property and the right itself to the benefit of a contract are each of them incorporeal. . . .

14*a*. Property is furthermore divided into that alienated by *mancipium* (*res mancipi*) and that not so alienated (*res nec mancipi*). . . . Servitudes over urban manors are *nec mancipi*. So too farms in provinces that pay taxes to the Roman people (*praedia stipendaria*) and in those that pay tribute to the Emperor (*praedia tributaria*) are not alienable by *mancipium* (*res nec mancipi*).

15. And we hold that those animals which are accustomed to be tamed are *res mancipi*. . . .

16. But wild animals are *res nec mancipi*, such as bears and lions, and so too are those animals which count as wild beasts, such as elephants and camels, and the fact

that these animals sometimes submit to be driven or ridden does not alter the fact. . . .

17. Almost all incorporeal things are incapable of alienation by *mancipium* (*res nec mancipi*), with the exception of servitudes over rural estates (*praedia rustica*); for the latter are grouped with the *res mancipi*, although they are amongst the number of things incorporeal.

18. There is an important distinction between *res mancipi* and *res nec mancipi*.

19. For *res nec mancipi* may be alienated so as to confer full legal ownership upon another by simply being handed over (*traditio*), provided, of course, they are things corporeal and therefore capable of being handed over (*i.e.* of *traditio*).

20. So if I were to hand over to you a garment, or some gold or some silver, either for the sake of selling it to you or as a gift, or for any other reason, it would immediately become yours, provided of course that I was the owner of it.

21. Provincial estates (*provincialia praedia*) are in the same position, but some of them are called stipendiary (*praedia stipendaria*), and others are called tributary (*praedia tributaria*): those are called "stipendiary" that are situate in provinces, which are considered to be the particular property of the Roman people; and those are called "tributary" which are in the provinces, specially appropriated to the Emperor.

22. Now, *res mancipi* are such things as are alienated to others by the formal ceremony of *mancipatio*; and for this reason they are called *res mancipi*. But the same result may be obtained by the ceremony of claiming ownership before a magistrate (*in jure cessio*).[12]

. . . . . .

28. Things incorporeal (*res incorporales*) are clearly not alienable by surrender (*traditio*).

[12] *In jure cessio* is used to describe a formal process of sale. Purchaser and vendor having agreed as to price and so forth, both went before a magistrate (*in jure*); the purchaser then made a formal declaration, stating the property to be his; the vendor raised no objection, and this was in effect a yielding up (*cessio*) of his rights of ownership: the magistrate thereupon affirmed the purchaser's contention, and the transference of the property was complete.

29. But rights over urban manors may only be transferred by *in jure cessio*; rights over country estates, however, may be transferred by *mancipatio* as well.

30. A usufruct (*usufructus*) is alienable only by *in jure cessio*; for the owner may transfer the use of property (*usufructus*) to another by this procedure, so that the latter has the use of it while he himself retains only the bare right of ownership. The dominant owner (*usufructuarius*) may revest the right in the original owner by *in jure cessio*, so that it passes from him and is merged into the full rights of ownership; if, however, he makes a *cessio in jure* to a third party, the right none the less still remains in him: for such a transfer is held to be void.

31. The same law also applies with regard to rights over Italian estates, because such estates may be transferred either by the ceremony of the *mancipatio* or by that of a *cessio in jure*. But this does not apply to rights over estates in the provinces, whether it be sought to establish a right of usufruct (*usufructus*), or a right of way on foot (*jus eundi* [13]), or a right of driving cattle (*jus agendi* [13]), or a right of watercourse (*jus aquam ducendi*), or a right of building a house higher (*jus altius tollendi*), or a right to prevent building higher lest a neighbour's light be obstructed (*jus altius non tollendi*), or other similar rights, though they can be created by means of agreements and stipulations (*pactiones et stipulationes*); and this is the case because the estates themselves are not transferable either by the ceremony of the *mancipatio* or by the *cessio in jure*.

32. But in as much as usufruct may be made operative, both as regards slaves and over certain animals, it must be pointed out that such rights may be created even in the provinces by a *cessio in jure*.

33. And the statement we have already made that usufruct is alienable only by *in jure cessio* is made advisedly, although that right may in effect be created by *mancipatio*, because it can be retained when the bare right of ownership is alienated by *mancipatio*; for in that case the right of usufruct itself is not passed by the *mancipatio*, but it is

[13] See *Dig.* XLV. i. 38, 6, note *post*.

retained when the ownership is alienated, and it happens therefore that the usufruct is in one person's hands and the right of ownership (*proprietas*) is in another's.

34. An inheritance (*hereditas*) also is only transferred by *in jure cessio*.

35. For if the man, to whom an inheritance belongs on intestacy by statutory right, yields it up *in jure* to some other man before he himself has accepted it (*ante aditionem*), that is to say, before he is in the actual position of heir, he to whom he so transferred it becomes the heir, just as if he were made heir by law. After a man has accepted the inheritance (*post obligationem*) however, if he makes a transfer of this kind he still nevertheless remains heir, and he is so regarded by creditors to the estate; the debts however, are discharged, and in this way debtors of an estate make considerable gain; the chattels comprised in the inheritance however, pass to him to whom the surrender was made, just as if each article had been transferred by *in jure cessio*.

36. The heir named in a will (*heres scriptus*) who, before he has accepted the inheritance (*ante aditam*), makes an *in jure cessio* of it to someone else, effects nothing; should he however, yield it up in that way after he has accepted the position of heir, the same things happen as have been mentioned above in reference to the man to whom an inheritance belongs on intestacy by statutory right, and who has surrendered his inheritance after acceptance.

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38. Rights arising from contract (*obligationes*) however created, are not alienable by any of these means; and if I desire to make whatever may be due to me from somebody under a contract, payable to you, I cannot adopt any of the means applicable to the transfer of things corporeal (*res corporales*) to do this; but it is necessary for you to enter into a formal agreement (*stipulatio*) with my debtor at my request; the effect of this is that he is discharged as a debtor to me, and begins to be liable to you. This is what is called the novation of a contract.

. . . . . .

40. It is convenient to mention here, that amongst

foreigners but one kind of ownership (*dominium*) is known ; for each man is considered to have either full ownership or nothing. In days gone by this was the case amongst the Romans ; for every man was an owner according to quiritian rights [14] or else he was not regarded as an owner at all. But in later times a division in the law of ownership was recognised, so that property might belong to one man according to the quiritian law, and yet be possessed *in bonis* [15] by another.

41. For if without the formality of a *mancipium* or the ceremony of a *cessio in jure*, I have simply handed over to you property transferable by *mancipium* (*res mancipi*), it will be numbered amongst your effects (*in bonis*) although it still remains mine according to the quiritian law, until such time as you shall have perfected your title to it by adverse possession : for once the full prescriptive period has elapsed (*impleta usucapione*) it becomes fully yours, both as being in your possession (*in bonis*) and by virtue of quiritian ownership, just as if it had been alienated to you by a formal *mancipium* or transferred by a *cessio in jure*.

42. A prescriptive right (*usucapio*) over movables is completed in one year, over land and houses however, in two years ; and it is so provided in the Law of the XII. Tables.

43. Moreover, we can acquire a title by prescription (*usucapio*) to property handed to us by some person other than the rightful owner, whether the property be something transferable by *mancipium* or something not so transferable, provided only that we took it in good faith, and believing that he who gives it up to us is in fact the owner of it.

. . . . . .

45. But it sometimes happens that prescription (*usucapio*) does not give a good title to anyone who possesses the property of another person, even though he acquired it in the greatest good faith. As, for instance, if it be stolen property, or property acquired by violence ; for the Law

[14] *Ex jure quiritium* represents full rights of ownership.
[15] *In bonis* represents a possessory title only.

of the XII. Tables forbids it in the former case, and the *lex Julia et Plautia* in the latter.

46. Moreover, prescription does not operate against estates in the provinces.

. . . . . .

48. And clearly there can be no prescriptive rights over free men—nor over things sacred (*res sacrae*), nor over things holy (*res religiosae*).

. . . . . .

62. It sometimes happens that the owner (*dominus*) of property has no right of alienation with regard to it, while someone who is not the owner can alienate it.

63. A husband, for instance, is by the *lex Julia* prohibited from alienating property received with his wife as her dowry, without her consent, although it is his property, either by *mancipium* or by the ceremony of *in jure cessio*, or even by permitting prescription against it. . . .

64. On the other hand the agnate who is guardian to a lunatic can alienate his ward's property by the Law of the XII. Tables; similarly, a creditor may sell the security pledged with him on an agreement, although it does not belong to him. But this appears to be the case, because the pledge is alienated with the debtor's permission, the original agreement being that the creditor may have power to realise his security if the debt be not paid.

65. From what has been said, it is clear that some things are alienable under the rules of natural equity (*jus naturale*), such as those which pass by surrender, while others are alienable under the civil law (*jus civile*): for the rights arising from the ceremonies of the *mancipium* and the *cessio in jure*, and from prescription (*usucapio*), are peculiar to the citizens of Rome.

66. According to the dictates of natural equity (*naturalis ratio*) we not only obtain for ourselves those things which are made ours by surrender (*traditio*), but also these things we have acquired by taking possession of (*occupatio*), because before that they belonged to nobody, such as things that may be captured on the earth, in the sea, or in the air.

67. Thus if we snare a wild animal, a bird, or a fish, it at once becomes ours, and is considered to remain ours,

so long as we keep it under our control; if however, it escapes from our custody and betakes itself to its natural liberty again, it is again open to capture, since it is no longer our property: an animal is considered to have regained its freedom when it escapes from our sight, or if, though it be still in our sight, its pursuit is difficult.

68. With regard to those animals, however, which are accustomed to come and go, like doves and bees, or even deer that go into the forests and return again, we have always held that when they cease to have the intention of returning they cease to be ours, and become open to capture (*occupatio*): and they are understood to cease to have the intention of returning when they cease the habit of returning.

69. The spoils of war, too, belong to their captor by natural equity (*naturalis ratio*).

70. And accretions to our land by alluvion become ours by virtue of the same law; whatever a river gradually adds to our land, so that the amount added in any given moment of time in imperceptible, is considered to be added by alluvion: hence it is commonly said that alluvion is an accretion so gradual, as to escape notice.

71. So if a river wash away a definite part of a field of yours and add it to one of mine, that part still remains yours.

72. And if an island is formed in midstream it belongs in common to those who own the neighbouring banks on either side; but if it should not be in midstream it belongs to the owner of the nearer bank.

73. Further whatever is built by anybody on our land, becomes ours by natural equity (*jus naturale*), even though that person built it on his own behalf, because whatever is superimposed on the surface of the land belongs to the land.[16]

. . . . . .

77. For the same reason, if anyone shall have written upon my tablets or on a parchment of mine, even though the letters be of gold, the writing is mine. . . .

78. But if an artist should paint let us say a portrait on a canvas of mine, the contrary opinion is approved:

[16] A similar rule prevails in English law.

for it is more expedient to hold that the canvas belongs to the painting; though for this departure from the rule no sufficient grounds can readily be given. . . .

79. The principles of natural reason apply also in another class of cases; for example, if you should make some wine, oil or flour from my grapes, olives or grain, is the product mine or yours? So too, if you make a vase from my gold or silver, a boat, a chest or a seat from my planks, a garment from my wool, or mead from my wine and honey, a plaster or an eye salve from my medicines, is the product made out of my property mine or yours? Some think material and substance ought to be regarded—that is to say, that he who owns the materials owns what was made from them, and this is what Sabinus and Cassius thought. Others, however, think it belongs to him who made it, and this view is accepted by the authorities of the opposite school.[17]

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I. Concerning Alienation by Wards

80. Attention must here be called to the fact that neither a woman nor a ward can alienate property which is conveyed by the ceremony of the *mancipium* (*res mancipi*) without the consent (*auctoritas*[18]) of their tutors. With regard to property not transferable by that ceremony (*res nec mancipi*) a woman can alienate this kind of property while a ward cannot do so (without his tutor's consent).

. . . . . .

83. On the contrary however, both women and wards may be paid anything whether it be transferable by the

[17] In later times this difference of opinion was settled to some extent by holding that if the product could be resolved into its original constituents—for instance, a vase melted down into a piece of metal—the product belonged to the owner of the material; if on the other hand it could not be so resolved, for instance, if the product were flour which, once ground, could not be turned back again into grains of wheat—it belonged to the person who made it.

[18] Consent is a convenient word to use here but *auctoritas* implies more than merely consent. The exercise of the *auctoritas* conferred legal capacity where it was otherwise wanting;

mancipium or not (*omnes res tam mancipi quam nec mancipi*) without the intervention of a tutor, because they are permitted to improve their circumstances without calling upon the tutor to exercise his *auctoritas*.

84. So if a debtor pays money to a ward, the property in the money passes to the ward, but the debtor is not discharged, because a ward cannot give a discharge from any obligation without his tutor's consent (*auctoritas*), for no power of alienating anything is conferred on him without that consent; though if the ward be made more wealthy by moneys so received and he still persists in suing for them, the action can be defended by pleading fraud (*per exceptionem doli mali*).

85. Payment may be properly made to a woman without the consent of her tutor however; and the debtor who has paid her is released from his liability, because women are permitted to alienate property not transferable by the *mancipium* (*res nec mancipi*), even without their tutor's intervention, as we have already said. This applies when they actually receive the money; but without actual receipt of the money, they cannot declare their wish to release the debtor, so as to effect a formal discharge (*acceptilatio*), without the assistance (*auctoritas*) of their tutor.

86. Property is also acquired for us not only directly, but also indirectly, through those who are subjected to our *potestas* or *manus*, or have passed to us under the ceremony of *mancipatio*; it is also acquired through those slaves over whom we exercise rights of usufruct; and in addition through freemen and slaves belonging to other people, whom we hold subject to our *potestas* in the *bona fide* belief that they are our slaves.

. . . . . .

88. It is important to notice this however, if a slave belongs to one man as being in his possession (*in bonis*), and is subject to the quiritian ownership of another, whatever

in the case of women the incapacity was not so great after puberty as it was before; they could then alienate *res nec mancipi* for instance, without *auctoritas*, but they still at this period needed the *auctoritas* in many cases to complete their legal capacity.

he acquires belongs to the master who owns him *in bonis*.

89. And we get not only a right of property (*proprietas*) through those whom we hold subject to our *potestas*, but actual possession (*possessio*) as well; for we are considered to have in our possession whatever they actually get into theirs; and this is why prescriptive rights through adverse possession accrue to us through slaves.

. . . . . .

91. With regard to slaves over whom we have a right of usufruct (*usufructus*), the accepted opinion is, that we only acquire what they make out of our goods or by their own abilities; all that they make from other causes belongs to the person having proprietary rights (*proprietas*) over them. . . .

92. And with regard to those, whether free or slaves to another, whom we hold in the *bona fide* belief they are our own slaves, the same rule prevails; for what was accepted in regard to the usufructuary owner was also approved in the case of the *bona fide* possessor: and therefore whatever is acquired from any other than those two causes mentioned, belongs either to the man himself, if he be free, or to his lord, if he be a slave.

93. The *bona fide* possessor of another man's slave can acquire property through him in any manner, when once he has perfected his title to him by lapse of time, for he thus becomes his owner. But a man who has only the right to the usufruct of a slave cannot become his owner by adverse possession; because, in the first place, he does not possess him at all, only having the right to profit by his labour; and secondly, because he knows him to be the slave of another man.

94. And concerning this right a doubt has arisen, whether, through a slave over whom we have the right of usufruct, we can have possession of anything and acquire a prescriptive title, because we do not in fact possess the slave himself. But it is clear that, through a slave whom we possess in the *bona fide* belief he is ours, we can both obtain possession and get a good prescriptive title. With regard to these two cases, we speak subject to the limita-

tion just explained — that is to say, that such persons acquire on our behalf things made from our materials or the products of their own industry.

95. From a consideration of all these things, it is manifest that we cannot acquire anything through free men that are neither subjected to our jurisdiction nor held by us in the *bona fide* belief they are our slaves, nor through other peoples' slaves, when we have neither a right of usufruct over them, nor a justifiable possession of them. . . .

96. In conclusion it should be mentioned, that nothing can be transferred by means of a *cessio in jure* to those who are subjected to our *potestas*, under our *manus*, or who have been conveyed to us by *mancipium*; for since these persons can have nothing of their own, it naturally follows that nothing can become theirs in this way (*i.e.* by a *cessio in jure*).

97. It is sufficient to have set out to this extent how we acquire articles singly (*res singulae*): for the law of legacies, under which we also acquire articles singly, will be more conveniently referred to later. Let us now inquire, therefore, into the methods by which we acquire property in the aggregate (*per universitatem*).

98. If we are made heir to anyone, or claim possession of all a man's goods (*bonorum possessio*), or purchase an insolvent's estate, or adopt a man or receive a woman (*in manu*) as a wife, the property in each case passes to us as a whole.

99. And let us first of all deal with the question of inheritance, of which two kinds must be noted; for an inheritance belongs to us either under a will or upon intestacy.

100. And in particular let us first treat of property which passes to us under a will.

101. There used to be two kinds of wills: for they were either made in the assembled *Comitia*,[19] which was summoned twice a year for the purpose of making wills, or upon the battlefield (*in procinctu*)—that is to say, when in case of a war, a man was going forth to fight; for the word

[19] The *Comitia Curiata*, the oldest form of popular assembly in Rome.

procinctus implies the army under arms on active service. So the former method prevailed in time of peace, and the latter when fighting was on hand.

102. A third kind of will was then introduced, which was effected by a formal sale symbolised by a bronze token and a pair of scales (*per aes et libram*): for men who had not made a will before the *Comitia* nor upon the battlefield (*in procinctu*), influenced by the suddenness of death, were wont to give their household (*familia*), that is to say, their whole patrimony, by the ceremony of the *mancipium* to a friend and tell him what they wished to be given, and to whom, after their death. Such a will is no doubt called a will *per aes et libram*, because it was effected by the ceremony of the *mancipium*.

103. The two former kinds of wills have however fallen into disuse; and the latter, that effected *per aes et libram*, is alone retained and used. The ceremony, however, is now carried out differently, and not as it formerly was; for originally the purchaser of the household (*familia*), he that is who received it by the ceremony of *mancipium* from the testator, held the position of heir, and on that account the testator used to order him what he wished to be given to each beneficiary on his death; nowadays, however, another heir is instituted in the will to whom the legacies are left for distribution, while for the sake of following the form of the ancient law a purchaser of the household (*familia*) is added.

104. The ceremony is carried out in the following manner: the man who is making the will, when, as in other sales by the ceremony of *mancipium*, he has summoned five Roman citizens of full age as witnesses and a balance holder, after he has written out the will formally sells his household (*familia*) by *mancipium*. In this affair the purchaser makes use of the following words:—"I hereby declare that your household and money in your care and guardianship becomes mine, and that those things be considered purchased by me with this piece of bronze" and as some add, "these scales of bronze, so that you may make a valid will according to law" (*familiam pecuniamque tuam endo mandatela tua custodelaque mea esse aio, eaque, quo tu jure testamentum*

facere possis secundum legem publicam, hoc aere [*et, ut quidam adiciunt,*] *aeneaque libra, esto mihi empta*) ; then he strikes the balance with the bronze and hands the piece of bronze to the testator as though it were the price ; then the testator, taking in his hands the tablets upon which the will is written, speaks the following words :— " These things as they are written upon these waxen tablets, I give, bequeath, and testify unto, and therefore, citizens, bear witness for me " (*haec ita ut in his tabulis cerisque scripta sunt, ita do ita lego ita testor, itaque vos, quirites testimonium mihi perhibetote*) : and this is called the declaration (*nuncupatio*), for the word *nuncupare* means to announce openly, and by this general formula the testator is considered to announce and confirm whatever he has specifically written in the tablets of the will.

105. Amongst the witnesses there ought not to be anyone who is subjected to the *potestas,* either of the purchaser of the household or of the testator himself, because the whole of this business, which is carried out for the purpose of the due preparation of a will, is thought to be done as between the purchaser of the household and the testator in imitation of the ancient law ; and formerly, as we have already explained, the man who received the testator's household in the ceremony of *mancipium* was regarded as the heir ; and so the testimony of members of his own household with regard to the matter was not accepted with approval.

106. Hence if a man who is subjected to the *potestas* of his father is chosen as purchaser of the testator's household, his father cannot be a witness ; nor can anyone who is subjected to the same *potestas* as he is, as for example, his brother. And if a son (*filius familias*) makes a will concerning his personal spoils of war (*castrense peculium*) after his discharge, neither his father nor anyone who is subjected to his father's *potestas* is a competent witness.

107. What has been said in regard to the witnesses must be considered to apply also to the holder of the scales (*libripens*) : for he is also numbered amongst the witnesses.

108. A man, however, who is subjected to the *potestas* of the heir or the legatee, or who exercises *potestas* over the heir or the legatee, or who is under the same *potestas*

as they are, may be a witness and the holder of the scales, since either the heir himself or the legatee may be admitted to this privilege. But with regard to the heir, whoever is in fact subjected to his *potestas*, or exercises *potestas* over him, ought only to take advantage of the privilege in the rarest cases.

. . . . . .

115. For a will to be valid in civil law, it is not enough that those things explained above in reference to the sale of the patrimony and the witnesses of the declaration (*nuncupatio*), should be complied with.

116. What is above all essential is to inquire whether the heir was instituted according to the appointed form; for if this be done otherwise, it is of no avail that the testator's patrimony was duly sold, that the witnesses were duly summoned, and that the declaration (*nuncupatio*) was duly made in the manner before mentioned.

117. The institution of the heir according to solemn rite is done by the following formula:—"Let Titius be heir" (*Titius heres esto*); the following is also an approved formula: "I order Titius to be heir" (*Titium heredem esse jubeo*); the form: "I wish Titius to be heir" (*Titium heredem esse volo*) is, however, not approved; and the following are for the most part disapproved:—"I appoint Titius heir" (*Titium heredem instituo*), and "I make Titius heir" (*heredem facio*).

118. Furthermore it must be pointed out, that if a woman who is subject to tutelage, makes a will, she must have the consent (*auctoritas*) of her tutor; for without it her testament is not valid according to the civil law (*jus civile*).

119. If, however, the will be sealed with the seals of seven witnesses, the praetor grants possession (*possessio bonorum*) to those named as heirs according to the will, provided that there is no one to whom the inheritance belongs by statutory right on intestacy, as for instance, a brother begotten by the same father as the testator, or a paternal uncle, or a brother's son, and thus the heirs named in the will have been enabled to keep the inheritance. And the same practice prevails if the will be invalid on other grounds,

as, for instance, if the patrimony (*familia*) was not duly sold or if the testator did not pronounce the formal declaration (*nuncupatio*).

120. In cases where there is a brother or an uncle, let us consider whether they oust the heirs named in the will : for in a rescript the Emperor Antonine ordained, that those who shall seek possession (*bonorum possessio*) under an improperly executed will may, as against those claiming the inheritance as on an intestacy, plead fraud (*exceptionem doli mali*) in defence.

121. This certainly applies to wills made by men ; with regard to women, too, it applies when their wills are defective in the formal requirements, for example, because they have not duly sold their patrimony or spoken the formula of the declaration (*nuncupatio*) : but whether this rescript (*constitutio*) applies where women have made wills without their tutors' consent (*auctoritas*) requires some investigation.

122. We refer of course not to women who are under the statutory tutorship of ascendants, or the tutorship of patrons, but to women who are under tutors of the other kind, who may be compelled to participate in the making of the will even against their judgment. For it is clear that an ascendant's or patron's rights cannot be avoided by a will made without their consent (*sine auctoritate*).

123. Further, any man, who has his son subjected to his *potestas* ought to be careful either to nominate him as the heir or else to specifically disinherit him by name for should he pass him over in silence his will is inoperative : so much is this the case that the authorities of our school hold that, even if the son has died in his father's lifetime, there can be no one heir under that will, for the obvious reason that the institution of the heir was imperfect from the very beginning ; but the teachers of the other school think that, provided the son is living at his father's death, he will clearly exclude the heirs named in the will and himself succeed to his father's estate as though his father had died intestate ; if, however, the son dies before his father, they think the inheritance passes according to the will, for no son then exists to prevent this ; and this is clearly

an opinion attributable to the fact that they do not think the mere omission of the son renders the will void from the very beginning.

124. If the testator should omit children other than sons the will is valid, but those omitted share with the heir named in the will in equal shares if the named heirs be family heirs (*sui heredes*[20]), and take a half between them, if the heirs named be strangers (*extranei*)[20]—that is to say, if a man, for example, should nominate as his heirs his three sons and pass over his daughter, she is made heiress and comes in for a fourth share, and this happens by reason of the fact that that is the share she would have received had her father died intestate ; but if the heirs named in the will be strangers (*heredes extranei*) and the daughter be omitted she is held to become heir of one half the inheritance. And what has been said about a daughter applies equally to a grandson and to all other descendants irrespective of sex.

125. What happens therefore is this : although, as we have already said, descendants are entitled to take half the inheritance away from the heirs named in the will, yet the praetor grants them possession of the whole (*possessio bonorum*) despite the will, and as a consequence the heirs named in the will, being strangers, are ousted and are made heirs without an inheritance (*heredes sine re*).

126. And this law used to be applied on the assumption that both sexes enjoyed equal privileges ; but recently the Emperor Antonine ordained by a rescript that women should take no greater share under the possession granted them by the praetor (*bonorum possessio*) than they would

[20] All the descendants of a man who were in his *potestas* at the time of his death were his *sui heredes*. They became heirs without any actual acceptance of the position of heir—and are therefore also further described with the addition of the word *necessarii*. They could if they liked renounce the inheritance, but any act which amounted to an intermeddling with the affairs of the estate prevented them from renouncing. The *heredes extranei* were heirs who were not in the class *necessarii* (*i.e.* slaves, who were obliged to take), or the class *sui et necessarii* ; and their nomination was equivalent to an offer of the inheritance which required their acceptance to make it operative. See also *Gai.* II. 152 *et seq. post.*

have taken as a result of their right to participate (*jus adcrescendi*) with strangers made heirs. The same rule is to prevail with regard to women who are emancipated, so that, as a result of the possession conferred by the praetor (*bonorum possessio*), they should certainly have the same share as, had they been subject to *potestas*, they would have had by their right to participate with stranger heirs.

127. Now if an eldest son is intended to be disinherited by his father, he must be specifically disinherited, for it cannot otherwise be done. A son is considered to be specifically disinherited if he is disinherited in this form: "Let my son Titius be disinherited" (*Titius filius meus exheres esto*); or omitting the Christian name, in this form: "Let my son be disinherited" (*Filius meus exheres esto*).

128. Other children irrespective of sex are legally disinherited by a general clause in the following words:— "Let all the rest be disinherited" (*Ceteri omnes exheredes sunto*), and these words were in times gone by added just after the formula nominating the heir, and this is the rule under the civil law.

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130. Posthumous children too must either be named heirs or expressly disinherited.

. . . . . .

135. It is not necessary to the civil law either to name as heirs or expressly disinherit children released from the *potestas*, because they do not rank as family heirs (*sui heredes*[21]): but the praetors rule that, irrespective of sex, they must all be disinherited if they are not made heirs—those that are males specifically (*nominatim*) and those of the female sex, either specifically or by a general clause (*inter ceteros*): and if they are not made heirs, nor disinherited in the manner indicated above, the praetor will grant them possession (*possessio bonorum*) despite the will.

. . . . . .

147. Wills that at the commencement were not made according to law, or though made according to law were afterwards made void or annulled, are not always entirely

[21] See note to *Gai.* II. 124 *ante.*

useless. For if the seven witnessing seals are present the heir named can obtain possession (*bonorum possessio*) according to the will, provided that the testator was a Roman citizen and *sui juris* at the time of his death. But if the will had been rendered void, let us say either because the testator had lost his status as a Roman citizen or his liberty, or because he had given himself in adoption, and at the time of his death was subject to the *potestas* of his adopted father, the heir named in the will cannot get possession (*bonorum possessio*) according to the purport of the will.

148. Those who get possession (*bonorum possessio*) under a will which was not made according to law at the first or which was legally made and afterwards became void or of no effect, get an effective possession (*bonorum possessio cum re*) provided that they can actually retain the inheritance: if, however, the inheritance can be withdrawn from them they have an empty title only (*bonorum possessio sine re*).

149. For if anyone else be instituted heir according to law, either under an earlier or a later will, or is the lawful successor upon intestacy, he can recover the inheritance from those to whom possession was granted; if, however, there be no other heir according to civil law (*jus civile*), the latter are entitled to retain the inheritance, and the cognate relatives have not any right to oust them, for they are disentitled by statute.

. . . . . .

151. It may happen, that a will legally executed becomes void by an intention to that effect. It does not, however, appear to be possible for a will to be made void merely because, after he has made it, the testator desires that it should have no effect, so that, even if he should cut the thread that ties the scroll, the will is, nevertheless, still binding in law. So too if he erases part or burns it, whatever was written remains binding, although proof of what was written may be difficult.

151*a*. Therefore, if anyone claims possession (*bonorum possessio*) on intestacy, and the person named as heir under such a will claims the inheritance, the former can

resist the latter's claim by a defence of fraud (*exceptio doli mali*), provided that the testator's intention is proved to have been that the inheritance should belong to those who are entitled upon intestacy; and this is signified in the Emperor Antonine's rescript.

152. Heirs are described either as heirs of necessity (*necessarii*) or as family heirs (*sui et necessarii*) or as strangers (*extranei*).[22]

153. A slave who is made heir and is given his liberty at the same time is an heir of necessity (*heres necessarius*); and he is so called because at the testator's death he is immediately given his freedom and made heir, whether he so desires or not.

154. Hence a man who knows that his circumstances are straitened sometimes gives his slave liberty and makes him heir in the first or second degree or in some more remote degree, in order that if there should not happen to be enough to satisfy the creditors, the goods and chattels of this heir may be sold rather than those of the testator himself, with the object that the ignominy (*ignominia*) which attaches to a compulsory sale of effects (*venditio bonorum*), may be borne by him rather than the testator; according to Fufidius, however, Sabinus was of opinion that ignominy ought not to attach to the slave, because he suffered a compulsory sale under the pressure of law, and not through any fault of his own; this however is not the law in use.

155. In return for this disadvantage that he suffers he is allowed the privilege of retaining for himself whatever he acquires after his patron's death, whether it be before or after the sale; and although the property is sold to meet any deficiency, there is no further sale of his own goods for the benefit of the inheritance, unless he has acquired anything out of it, as, for instance if he happens to increase his wealth by virtue of what a freedman (*Latinus*) acquired on behalf of his patron's estate.

156. The heirs designated family heirs (*sui et necessarii*) are, for example, the son or daughter, the grandson or granddaughter descended from a son, and successively those other descendants who were in any degree subject to the

[22] See note to *Gai.* II. 124 *ante*.

potestas of the deceased; but in order that the grandson or granddaughter may be *suus heres*, it is not enough that he or she should have been subjected to the testator's *potestas* at his death, but it is also necessary that their father should have ceased to be *suus heres* to his father during the latter's lifetime, either because he had died or was released from his father's *potestas* for some other reason; for the grandchild succeeds in the place of his or her father.

157. The family heirs (*sui heredes*) are so called because they are the testator's family successors, and during their ascendant's lifetime they are considered to be in some measure co-owners with him; for this reason, even if a man dies intestate, the succession first of all devolves upon his children. And they are called *necessarii* in addition because they are made heirs in any event, irrespective of their own wish in the matter, just as much upon intestacy as under a will.

158. The praetor, however, allows them to refuse the inheritance, in order that their ascendant's property may be sold.

159. The same law applies to a wife, who is subjected to the *manus* [23] of the testator, because her position is equivalent to that of a daughter, and also to a daughter-in-law, who is subjected to the *manus* of a son of the testator, because her position is equivalent to that of a granddaughter.

. . . . . .

161. All other persons who are in no way subjected to the testator's *potestas* are called stranger heirs (*heredes extranei*).

. . . . . .

164. It is the custom to give stranger heirs a time for decision (*cretio*)—that is to say, a period for deliberation—so that within a specified time they may accept the inheritance or refuse it, and if they do not accept within the time their rights are barred. And this is called a *cretio* (time for decision), because the word *cernere* implies the act of deciding and determining.

[23] See *Gai.* I, 49 *ante*.

165. When therefore the will is written in the form: "You, Titius, be heir" (*heres Titius esto*), we must add: "and decide within the next hundred days, after you know and can decide; and if you do not come to a decision, then be disinherited" (*cernitoque in centum diebus proximis quibus scies poterisque quodni ita creveris, exheres esto*).

166. And anyone who is instituted heir in this way must, if he wishes to accept the inheritance, make his decision within the time allowed by the *cretio*, and such a decision is announced in the following form:—"Inasmuch as Publius Mevius has made me his heir by his will, I decide to take and enter upon that inheritance" (*quod me Publius Mevius testamento suo heredem instituit, eam hereditatem adeo cernoque*). And if he does not so announce his decision, at the end of the time limited by the *cretio* his right to acceptance is excluded: nor does it profit him anything that he has acted as heir in the meantime, —that is to say, has used the property comprised in the inheritance as an heir would use it.

167. But if a man is nominated heir without a *cretio* or is the lawfully appointed intestate successor to an inheritance, he may obtain the position of heir, either by a formally announced decision or by acting as heir or even by simply having the intention of accepting the inheritance: and it is open to him to commence his duties as heir whenever he likes; but in practice the praetor, at the request of the creditors of the estate, usually fixes a time within which, the heir, if he so wishes, may assume the inheritance, so that, if he does not desire to be heir, the creditors may be entitled to sell the dead man's effects.

168. Just as the heir who is appointed with a time for decision (*cretio*) does not become heir unless and until he decides to accept the inheritance, so similarly is he only excluded if he does not announce his decision within the time limit: hence, although he may have decided not to accept the inheritance, while the time limited by the *cretio* is still running, yet if he changes his mind before its expiry he can become heir by making the formal announcement.

169. And just as a man, who is named heir without a period of time for decision (*cretio*), or who is the lawful successor upon an intestacy, may become heir by the bare intention to accept the position, so too, may he forfeit his rights by a bare intention to renounce the inheritance.

170. Every *cretio* has a limit of time fixed. A hundred days is considered a reasonable time for the purpose: though as a matter of fact a longer or a shorter period may be given, and is good in law; if, however, the limit given be longer than a hundred days the praetor sometimes reduces it.

171. Now although every *cretio* is limited in its duration to a fixed period, yet there is one kind called the *cretio* in common form (*cretio vulgaris*), and another kind called the limited *cretio* (*cretio certorum dierum*): the *cretio* in common form (*vulgaris*) is the one we have set out above—that is to say, the one in which these words are added: "within which he shall know and be able to choose" (*quibus sciet poteritque*): the limited *cretio* (*certorum dierum*) is one in which these words are omitted and the others are written.

172. There is an important distinction between these two forms; for in the common form (*vulgaris*) the time does not begin to run until a man knows he has been nominated as heir and is enabled to decide; in the case of the limited *cretio*, however, the time begins to run at once, whether the heir knows of his appointment or not; and so the time is counted against an heir who for any reason is prevented from deciding, and still more against a man who is made heir subject to a condition; for this reason therefore it is wiser and more satisfactory to make use of the *cretio* in common form (*vulgaris*).

173. The limited *cretio* is sometimes described as continuous (*cretio continua*), because the time runs from the death without intermission; but, inasmuch as this form often works a hardship, the other is in more general use; and it is on this account it is spoken of as the common form (*cretio vulgaris*).

II. Concerning Alternative Heirship

174. Sometimes two or more heirs with successive rights are nominated, in the following manner :—"Lucius Titius be heir and decide within the first hundred days, after you know and can decide. But if you do not decide, be disinherited. Then let Mevius be my heir and let him decide within a hundred days, and so on" (*Lucius Titius heres esto cernitoque in diebus centum proximis, quibus scies poterisque. Quodni ita creveris, exheres esto. Tum Mevius heres esto cernitoque in diebus centum, et reliqua*); we can in this manner substitute in succession as many heirs as we like.

175. We are allowed, moreover, to substitute one heir in succession to one or to several, and in the contrary case, to substitute one heir or several in succession to several heirs.

176. So the man nominated heir in the first place becomes heir by duly making his decision, and the substitute is shut out from any claim to the inheritance; and if the former fails to decide upon an acceptance he is displaced, even if he has acted as heir, and the substitute succeeds in his place; and if there be still other substitutes, the same course applies to each in turn.

177. But if a time limit for decision (*cretio*) be given without a disinheriting clause, as in the following formula :—"If you do not decide then let Publius Mevius be my heir" (*si non creveris, tum Publius Mevius heres esto*) a different course prevails, for, if the first named, without duly announcing his decision, acts as though he was heir, he thereby lets in the substitute to share, and they both become heirs in equal parts; but if in such a case the first named neither decides upon acceptance nor assumes the duties of heir, then he loses all, and the substitute succeeds to the whole inheritance.

178. But Sabinus was of opinion that as long as the first named had the option of deciding, and thereby becoming the heir, even if he acted as the heir, the substitute was not let in to share; but as soon as the period of choice

(*cretio*) was passed, by acting as heir he then let in the substitute: others however think that while the period limited by the *cretio* is unexpired the heir first named by taking upon himself the duties of heir can admit the substitute to a half-share, but that afterwards he cannot rely upon the right of choice.

179. Not only can we substitute heirs in place of those of our children, who are subject to our *potestas*, and under the age of puberty, as above explained, so that, if they do not live to be our heirs someone else will fill their place, but there is also a more effective substitution allowed; so that, if they live to be our heirs, but die while still under the age of puberty, an heir to them may be nominated by us in the following formula:—"My son Titius be my heir. If my son will not be my heir or if he will be my heir and dies before he reaches his majority, then let Seius be my heir" (*Titius filius meus mihi heres esto. Si filius meus mihi heres non erit, sive heres mihi erit et is prius moriatur quam in suam tutelam venerit tunc Seius heres esto*).

180. In such a case, if the son does not live to be heir, the substitute is made the father's heir; if, however, the son becomes heir and dies while under the age of puberty, the substitute is made heir to the son himself. So there are in a sense two wills, the one the father's will, and the other the son's, just as if the son himself had nominated an heir to succeed him; or at any rate there is one will for two inheritances.

181. Further lest a ward (*pupillus*) should be exposed to the danger of plots after his ascendant's death, it is the practice to make use of the common form of substitution (*substitutio vulgaris*) in public — that is to say, on the occasion when and in the place where the ward is nominated heir; for the common form (*substitutio vulgaris*) only operates to give the substitute a claim, if the ward does not survive to be heir: this only happens if he dies in his father's lifetime, and in that event the substitute cannot be suspected of doing him an evil, because during the testator's lifetime whatever may be written in the will is a secret: that kind of substitution, however, which is employed to meet the emergency of the ward becoming

heir and dying under the age of puberty is separately written in the last tables of the will, which are bound with a separate cord and sealed with separate seals and in the earlier part of the will it is provided, that the last tables of the will are not to be opened while the son is still alive and under the age of puberty. But it is much safer for both kinds of substitution to be sealed up separately in the later tables of the will, because if separate substitutions were signed in the manner explained above, it could be guessed from the earlier one that the same man was substituted in the later appointment.

182. Not only can we nominate substitutes in the place of children under the age of puberty whom we have instituted our heirs, so that if they should die before attaining their majorities whomsoever we wish shall be heir, but we can also, in like manner, substitute heirs in the place of disinherited children, and if such a substitution takes effect everything that the disinherited child has acquired, either from inheritances or legacies or by way of gifts from relatives, passes to the substitute.

183. All that we have said with regard to making substitution for our children under the age of puberty, whether they be named heirs to us or be disinherited, must be understood to apply equally to posthumous children.

184. For a stranger heir (*heres extraneus*) we cannot make substitution, in such a way that if he lives to be heir, and dies within a specified time thereafter, someone else is heir to him ; but this much at any rate is permitted, we can compel him by means of a trust (*fideicommissum*) to hand over the inheritance in whole or part to another ; what this right is, will be dealt with in due course.

185. We are allowed to make our own slaves or another man's slaves our heirs, just as we can make free men our heirs.

186. A slave of our own ought to be granted freedom and designated heir at the same time, in the following form :—" Let my slave Stichus be a free man and my heir " (*Stichus servus meus liber heresque esto*), or in this form : " Be heir and free " (*heres liberque esto*).

187. For if the slave be named heir without being given freedom, then, even if he be released by his owner after the will was made, he cannot be the heir, for the appointment is ineffectual on account of his status ; and therefore although he has been sold, he cannot on his new master's orders accept the inheritance.

188. If a slave made heir with a grant of freedom has remained a slave, he is made a free man by the will and so becomes an heir of necessity (*heres necessarius*) ; if however he was liberated by the testator himself prior to his death, he may accept the inheritance or not at his discretion ; but if he has been sold he ought to accept on his new master's orders, and so the master becomes the heir by means of him, for he himself can neither be heir nor free.

189. If the slave of another man be nominated heir, and remains in slavery at the testator's death, he must accept the inheritance if his master so orders ; and if he has been transferred from his owner either during the testator's lifetime or after his death, but before he has decided to accept the inheritance, he must act according to his new master's directions ; of course if the slave has been released in the meantime he may choose for himself.

190. If the slave of another man be appointed heir subject to a time limit for choosing in the common form (*cretio vulgaris*), the time limit of the *cretio* is considered to run if the slave himself knows of his appointment and there is nothing to prevent him from acquainting his master of the fact, so that he can make his decision according as the latter directs.

191. Let us now investigate the law of legacies. This part of the law seems to be beyond the scope of the subject we set out to deal with ; for our discussion concerned the branch of law dealing with acquisition of property in the aggregate (*per universitatem*) : but inasmuch as we have been dealing with wills and heirs who are instituted under a will of every kind, it would not seem to be inappropriate to treat of this branch of the law also.

III. Concerning the Law of Legacy

192. Legacies are of four kinds ; either *per vindicationem, per damnationem, modo sinendi,* or *per praeceptionem.*[24]

193. A legacy *per vindicationem* is left in the following form : "To Titius," for example, "I give and bequeath the slave Stichus" (*Titio hominem Stichum do lego*) ; and if either word be used alone, that is to say, either give (*do*), or bequeath (*lego*), the legacy is just as much one *per vindicationem* : and it appears to be accepted that the legacy is of the same kind, if the form used be : "Let him appropriate" (*sumito*) ; or "Let him possess for himself" (*sibi habeto*) ; or "Let him choose" (*capito*).

194. This method is described as *per vindicationem*, because the property bequeathed becomes the legatee's in full quiritian ownership immediately the heir has entered upon his inheritance, and if the legatee seeks to recover the property either from the heir or from anyone else who has possession of it, he must proceed by an action at law (*vindicatio*), that is to say he must claim that the property is his by right of quiritian ownership.

195. With regard to just one point the authorities differ ; for, Sabinus Cassius and the rest of our school think that if a legacy is left in that way the property passes to the legatee immediately the heir accepts the inheritance, even if he has no knowledge a legacy has been left him, but that if afterwards, when he knows of the legacy, he rejects it, the effect is the same as if no legacy had ever been given to him ; but Nerva and Proculus, however, and the rest of that school are of opinion that the property does not become the legatee's, unless he wishes it to belong to him. At the present day, in consequence of a constitution published by the late Emperor Pius Antoninus, the opinion of the Proculians rather seems to be the law in use ; for when a *Latinus* was bequeathed *per vindicationem* to a colony, "Choose," said the Emperor's decree to

[24] As there is no convenient English equivalent for these terms, the Latin names will be preserved ; the terms are explained in the text.

the council of the colony, "whether you wish him to be yours, just as if he had been left to one of you."

196. Only such things as belong to the testator in quiritian ownership can be legally bequeathed *per vindicationem*, but it appears also to be thought sufficient that things which are weighed, counted, or measured, as for instance wine, oil, corn, or money should belong to him at the time of his death in quiritian ownership; all other things, however, ought to be the testator's in quiritian ownership at both times; that is to say, at the time when he made his will, and also at the time when he died; and if this be not the case the legacy is void.

197. This is clearly so according to the civil law. But in later times an Act of Senate was passed at the suggestion of the Emperor Nero, which provided that, if anyone bequeathed property which never had been his, the legacy should be valid, just as if it had been given in the most binding form known to the law. The most binding form known to the law is the method known as *per damnationem*, and by making use of it the property of other people can be bequeathed, as will be made apparent later.

198. But if a man has bequeathed property that is his own, and then after his will was made has alienated it, many authorities think that not only is the legacy void according to the civil law, but also it is not made good by the Act of Senate. And this opinion prevails, because if a bequest is made in the method *per damnationem* and the subject matter of the legacy is afterwards alienated, the general opinion is, that although it may be strictly payable in law, yet the legatee seeking to enforce his title can be successfully resisted by the defence of fraud (*exceptio doli mali*), as if he were claiming contrary to the testator's intention.

199. This, at any rate, is agreed, that when the same thing is bequeathed to two or more beneficiaries by legacy *per vindicationem*, whether it be left to them jointly or severally and all of them come into the legacy, an equal share belongs to each of them, and the share of one who has no children accrues for the benefit of his co-legatee. Such

a legacy is left jointly in these words: "To Titius and Seius I give and bequeath the slave Stichus" (*Titio et Seio hominem Stichum do lego*); and severally in these words: "To Lucius Titius I give and bequeath the slave Stichus. I give and bequeath the same slave to Seius" (*Lucio Titio hominem Stichum do lego. Seio eundem hominem do lego*).

200. A question however does arise, as to who owns a legacy *per vindicationem* that is bequeathed subject to a condition, while the condition is still unfulfilled: our teachers regard it as belonging to the heir on the analogy of a conditionally liberated slave (*statu liber*), that is to say, of a slave that is ordered to be free by a will upon some condition being fulfilled, who it is agreed is the slave of the heir in the meanwhile; but the other school hold that the property so bequeathed is ownerless (*res nullius*) in the interval; and they hold this view with more persistency in reference to property which is bequeathed simply, and without any condition, during the period which elapses between the testator's death and acceptance of the legacy by the legatee.

201. A legacy *per damnationem* is bequeathed in the folowing form: "Let my heir be bound to give my slave Stichus" (*heres meus Stichum servum meum dare damnas esto*); and if the words, "Let him give" (*dato*) be used, the bequest is *per damnationem*.

202. In legacies of this sort even property which belongs to persons other than the testator may be bequeathed, so that the heir may be compelled to buy it and hand it over, or alternatively to give the legatee its value.

203. Moreover, things which are not yet in existence may be bequeathed, provided they will one day come into existence, by legacy *per damnationem*; as, for example, the crop that will be grown upon a particular field, or the offspring of a certain slavewoman.

204. Now, whatever is bequeathed in this manner, even when the gift is unconditional, does not immediately pass to the legatee, after the inheritance is accepted, as is the case in a legacy *per vindicationem*, but still remains the property of the heir: and on this account the legatee

must recover it by a personal action (*actio in personam*), that is to say, claim that the heir ought to give possession of it to him, and then the heir, if the property is alienable by the ceremony of *mancipium* (*res mancipi*), must give it up to the legatee in that way, or to hand over possession of it by a *cessio in jure*. If the property in the gift be not alienable by *mancipium* (*res nec mancipi*) simple delivery is sufficient. If the former kind of property (*res mancipi*) is given by delivery simply, and not by the *mancipium*, the legatee's title can ultimately be perfected by prescription. A prescriptive title is complete, as has been mentioned elsewhere, in one year with regard to movable property, and in two years with regard to things which are attached to the soil.

205. There is this difference between this kind of legacy and that *per vindicationem*, that if the same thing is bequeathed to two or more persons by the method *per damnationem* a share is owed to each legatee, provided the legacy is a joint one, as we have said is the case in a legacy *per vindicationem*; if, however, the bequest be several, the whole thing is owed to each one; and so it obviously happens that the heir must give the thing itself to one beneficiary, and its value to another; and the share of a childless legatee, when the legacy is joint, does not belong to the co-legatees, but accrues for the benefit of the inheritance.

206. When we say that the share of a childless legatee in the case of a legacy *per damnationem* is retained in the inheritance, while in the case of a legacy *per vindicationem* it accrues for the benefit of a co-legatee, it must be noted that this was the case according to the civil law (*jus civile*) before the *lex Papia* was passed; after the *lex Papia*, however, the share of a childless legatee became an escheat and belonged to those mentioned in the will who had children.

207. Although in recovering an escheated share the heirs who have children have the first claim, and then if they have none, the legatees who have children the next, yet the *lex Papia* itself lays down, that when the legacy is joint, a legatee with children is to be preferred to the heirs even if they have children.

208. And the general opinion is, that as far as the law goes which the *lex Papia* enacted in reference to joint legatees, it is of no consequence whether the legacy be left *per vindicationem* or *per damnationem*.

209. A legacy *sinendi modo* is left in the following manner: "Let my heir be condemned to allow Lucius Titius to claim and have for his own the slave Stichus" (*heres meus damnas esto sinere Lucium Titium hominem Stichum sumere sibique habere*).

210. This kind of legacy has a wider scope than that *per vindicationem*, though not so wide as that *per damnationem*: for in this method the testator can, besides his own property, validly bequeath that of his heir also, whilst by the method *per vindicationem* he can only give his own property, though by the method *per damnationem* he is permitted to give the property of any other person he likes.

211. If property bequeathed in this way (i.e. *sinendi modo*) belongs to the testator or to his heir at the time of the testator's death, the legacy is clearly a good one even if at the time of making the will it did not belong to either of them.

212. And if the property bequeathed first becomes the heir's after the testator's death, a question arises as to whether the legacy is valid; and the general opinion is that it is not. But what of that? For even if a man bequeathed what never was his, nor ever afterwards became his heir's, it would appear under the Emperor Nero's Act of Senate (*senatus consultum*) to be in the same position as if it had been a legacy left *per damnationem*.

213. Just as property left *per damnationem* does not become the legatee's the moment the inheritance is taken up, but remains the heir's all the time, until he makes it the legatee's either by surrender or by the ceremony of the *mancipium*, or by a *cessio in jure*, so it is in the case of a legacy *sinendi modo*; and therefore for this legacy also there is a personal action for "Whatever the heir ought to give and do under the will" (*quidquid heredem ex testamento dare facere oportet*).

214. There are some people who think that in this sort of bequest the heir is not obliged to carry out the *manci-*

pium, or the *cessio in jure*, or to make surrender, but that it is sufficient that he should permit the legatee to assume possession of the property bequeathed; and the reason is because the testator ordered him to do nothing more than to allow, that is to say, permit the legatee to have possession for himself.

215. In this kind of legacy a more important divergence of opinion has found a place when it happens that the same thing has been left to two or more beneficiaries severally; some think the whole thing is owed to each, as is the case in a several legacy *per damnationem*; others consider the claims of the legatee in possession prevail, because, since in this kind of legacy the heir is condemned to permit a legatee to get the legacy, it follows that if he has extended this indulgence to the first comer and he has assumed possession, the heir need not concern himself with a legatee who afterwards claims the legacy from him, for he neither has the property in possession so as to let it be taken from him, nor has he committed any fraud and thereby prevented the later claimant having possession of it.

216. A legacy *per praeceptionem* is left in the following form: "Let Lucius Titius receive the slave Stichus in advance" (*Lucius Titius hominem Stichum praecipito*).

217. Some of our teachers think nothing can be bequeathed in this way save to a man who is named as heir to some part of the testator's estate; for to "receive in advance" (*praecipere*) means to acquire before the general distribution of the inheritance, and this only benefits one who is instituted heir to some part, because in addition to his share of the inheritance he will have a legacy prior to the general distribution.

218. Hence if a legacy be thus bequeathed to some third person it is void, and indeed Sabinus was of opinion that not even the Act of Senate passed by Nero could make it valid. "For," says he, "only those things are made binding by that Act of Senate, which by reason of a defect in form are not binding in civil law (*jus civile*), and not those gifts which fail by reason of the legatee's personal inability to take." But Julian and Sextus thought

that even in such a case the Act of Senate cured the defect in the legacy; for even in this case it happens that a mere verbal defect makes the legacy void at civil law (*jus civile*) for it is quite clear that a gift to the same person could be legally made by using another formula, as, for instance, one of those proper in legacy *per vindicationem*, *per damnationem*, or *sinendi modo*; but a legacy fails by reason of a legatee's personal inability to take when the bequest is to a man to whom it can in no wise be bequeathed, as for instance, a bequest to a foreigner in whose favour the testator has no power to make a will (*testamenti factio*). In such a case the Act of Senate referred to clearly does not apply.

219. In our school too the opinion prevails that what is left in this method can only be recovered by the legatee to whom it is bequeathed by means of the action called *familiae erciscundae*, which is generally used amongst heirs for partitioning or dividing up an inheritance; for the scope of the arbitrator's reference (*officio judicis*) is sufficiently wide to enable him to adjudge to a legatee a legacy left *per praeceptionem*.

220. From this we gather that, according to the opinion of our teachers, nothing, except what belongs to the testator, can be bequeathed *per praeceptionem*. For only property that belongs to the inheritance can be the subject of this action. And so if a testator has left something that is not his own under a legacy of this kind, the legacy will, in fact, be void under the civil law (*jus civile*), but be made operative by the Act of the Senate referred to. They do admit, however, that in one case even the property of someone else can be bequeathed *per praeceptionem*—namely, if anyone bequeaths something that has been given by the ceremony of the *mancipium* to a creditor as security (*fiduciae causa*), for they think that the reference to the arbitrator (*judex*) enables him to compel the co-heirs to discharge the debt and release the property, so that the legatee may receive it in advance.

221. But the leaders of the other school think that it is even permissible to bequeath *per praeceptionem* to any stranger, as if the form of bequest was: "Let Titius

take the slave Stichus" (*Titius hominem Stichum capito*), the addition of the syllable *prae* ("in advance") being surplusage, and hence the legacy should be construed as a gift *per vindicationem*. And this opinion is said to have been confirmed by the late Emperor Hadrian.

222. Therefore, in accordance with this ruling, if the property bequeathed belonged to the testator by right of quiritian ownership, it was recoverable by the legatee whether he was one of the family heirs (*heredes sui*) or a stranger (*heres extraneus*); but if it be only reckoned among the possessions (*in bonis*) of the testator, the gift, if to a stranger (*heres extraneus*), will be valid by reason of the Act of Senate, and if to a family heir (*heres suus*) it will be secured to him by the arbitrator (*judex*) in the proceedings for partitioning the inheritance (*familae herciscundae*); and if it is not the testator's property at all, then the gift will be good either as regards a family heir or a stranger, by reason of the Act of Senate.

223. So therefore, when the same thing is bequeathed jointly or severally to two or more family heirs (*heredes sui*), according to our school's opinion, or to two or more stranger heirs (*heredes extranei*), according to the view of our opponents, each ought to have his share.

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IV. Invalid Legacies

229. A legacy given before the appointment of the heir is of no effect, because a will acquires its binding force from the heir's appointment, and it is on this account that the appointment of the heir is regarded as the very cornerstone of the whole will.

230. For the same reason liberty to slaves cannot be given by will before making the appointment.

231. The leaders of our school think that tutors even cannot be named in that part of the will; but Labeo and Proculus think a tutor can be so given, because an appointment of a tutor does not make any demands upon the estate.

232. A legacy to take effect after the death of the heir

is also void, for instance in this form : "When my heir is dead I give and bequeath," or "let him give" (*cum heres meus mortuus erit, de lego, aut dato*). But a legacy in the form : "When my heir shall die" (*cum heres meus morietur*) is good because it is not made to take effect after the death of the heir, but at the last moment of his life. On the other hand a legacy cannot be bequeathed to be given : "the day before my heir's death" (*pridie quam heres meus morietur*) ; this appears to be the received view, for no very good reason.

233. The same remarks must also be understood to apply to enfranchisements of slaves.

234. Whether a tutor can be nominated after the death of the heir, probably raises the same question as that which arose in reference to the case of a tutor who was named before the heir was appointed.

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238. Legacies to persons uncertain are of no effect. A person whom the testator includes when he has only a vague notion of him in his own mind is considered to be a person uncertain ; as, for example, if the legacy were as follows : "Let my heir give ten thousand *sestertii* to the man who is first to come to my funeral" (*qui primus ad funus meum venerit, ei heres meus X. milia dato*) the law is the same if a general bequest to them all be made : "Whosoever shall come to my funeral" (*quicumque ad funus meum venerit*) ; and whatever is bequeathed in the form following is in the same case : "Let my heir give ten thousand *sestertii* to whatever man shall bestow his daughter in marriage upon my son" (*quicumque filio meo in matrimonium filiam suam conlocaverit, ei heres meus X. milia dato*) ; the same also applies when the legacy is as follows : "Whoever after my will was written shall first have been named consuls" (*qui post testamentum scriptum primi consules designati erunt*), for this too is regarded similarly as a bequest to persons uncertain ; and there were many other gifts of this kind. Subject to a sufficient description however, a legacy to a person uncertain was validly left, as, for instance : "Let my heir give ten thousand *sestertii* to the first of those who at the present time are my cog-

nate [25] relations who shall come to my funeral" (*ex cognatis meis, qui nunc sunt, qui primus ad funus meum venerit, ei X. milia heres meus dato*).

239. Nor is it considered possible to bequeath liberty to persons uncertain, because the *lex Fufia Caninia* enacts that slaves must be enfranchised by name.

240. A tutor given under a will ought also to be a person certain.

241. A bequest to a *postumus alienus* is also invalid. A *postumus alienus* is a person who, when he is born, will not rank amongst the testator's family heirs (*sui heredes*); therefore a grandson begotten by an emancipated son is a *postumus extraneus*. So also the unborn child in the womb of a woman, who has not in civil law the status of a wife, is regarded as a *postumus extraneus* of his father.

242. And a *postumus alienus* cannot even be instituted heir: for he is a person uncertain.

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246. Now let us turn to the law concerning trusts (*fideicommissa*).

247. And first of all let us examine them in regard to inheritances.

248. Now, in the first place, it must be clearly understood that someone or other must be properly instituted heir according to law, and that he must be pledged to hand over the inheritance to a third party; for a will in which no heir is legally appointed is useless in all other respects.

249. The following words appropriate to the declaration of a trust (*fideicommissum*) are those most generally used: I request (*peto*), I ask (*rogo*), I desire (*volo*), I rely on your faith (*fidei committo*), and they are just as effective used singly as they would be if all were used together in one formula.

250. Therefore when we write: "Let Lucius Titius be heir" (*Lucius Titius heres esto*), we can add: "I ask and request you, Lucius Titius, that, as soon as you are able to enter upon my inheritance, you should surrender

[25] Cognate relatives (*cognati*) are those related by consanguinity.

it and restore it to Gaius Seius " (*rogo te Luci Titi, petoque a te, ut, cum primum possis hereditatem meam adire, Gaio Seio reddas restituas*). It is permitted too to ask that a part only of the inheritance be given up. A trust (*fideicommissum*) may, moreover, be conditional or unconditional, or made to operate from a specified date only.

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260. Any man may, by means of a trust (*fideicommissum*) bequeath things singly, such as a farm, a slave, a garment, silver, or money; and he may either ask the heir himself. or the legatee, to hand it over to a third person, although it is not permissible to bequeath anything away from the legatee.

261. Further, it is not only the testator's own property that can be left by means of a trust, but in addition, the property of his heir or of his legatee, or anybody else's property. So, therefore, a legatee may be asked to hand over not only the property actually bequeathed to him, but also other property, whether belonging to himself or to somebody else. But there is this limitation to be observed—namely, that no one must be asked to hand over more than he has himself become entitled to under the will; for any excess over that amount is void.

262. When property belonging to a third person is bequeathed by means of a trust (*fideicommissum*) the person who is charged with the trust must either buy the thing itself and hand it over, or else pay its value to the beneficiary, just as is the law when property other than the testator's is bequeathed by a legacy *per damnationem*. Some authorities, however, hold that if the owner of the property left under the trust refuses to sell it, the trust fails; but this is not the law in the case of a legacy *per damnationem*.

263. Liberty to a slave can also be given by a trust in such a manner that the heir or legatee is asked to carry out the enfranchisement.

264. And it makes no difference whether the testator's request be directed with regard to a slave of his own, or one belonging to the heir, or to the legatee, or even to one belonging to a stranger.

265. So, therefore, another man's slave ought to be purchased and released. If, however, his owner will not sell, the freedom conferred by the trust is clearly of no avail, for in such a case no computation of price can arise at all.

266. A slave who is released under a trust does not thereby become a freedman (*libertus*) of the testator, even though he was one of the testator's own slaves, but is regarded as a freedman of the trustee who released him.

267. But the slave who is ordered to be made free by the direct agency of the will itself, as, for instance, in the words following : " Let my slave Stichus be free " (*Stichus servus meus liber esto*), or under this formula : " I order that my slave Stichus be made free " (*Stichum servum meum liberum esse jubeo*), becomes the freedman (*libertus*) of the testator himself. Only those slaves that belonged in full ownership (*ex jure quiritium*) to the testator, both at the time when he made his will, and at the time when he died, and no others, can have liberty conferred upon them directly under the will.

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THIRD COMMENTARY

88. Let us now consider the law of obligations, of which the chief division is into two main classes; for every obligation arises either from a contract (*ex contractu*), or from a tort (*ex delicto*).

89. And in the first place, let us examine those that arise from contracts. There are four kinds of contractual obligations; for they arise either from conduct (*obligatio re*), or by express words (*obligatio verbis*), or by writing (*obligatio litteris*), or by consent (*obligatio consensu*).

90. An obligation arising from conduct (*obligatio re*) is contracted, for example, in the case of giving a loan (*mutuum*); a *mutuum* is usually restricted to objects that are weighed, counted, or measured, such as money, wine, oil, corn, bronze, silver, or gold; and these things, when they have been counted, measured, or weighed out, are handed over so as to become the property of the recipient and on the understanding that not the identical property handed over, but other things of the same kind, should be repaid ultimately. And this is the origin of the name *mutuum*, for what is given in this way by me to you, after being mine (*meum*), becomes yours (*tuum*).

91. Further, anyone who accepts something that is not in fact owed, from one who paid it by mistake, contracts an *obligatio re* inferred from his conduct in accepting it. . . .

92. An obligation arising from express words (*obligatio verbis*) is made by question and answer. For example, "Do you undertake it shall be given? I so undertake" (*Dari spondes? Spondeo*). "Will you give it? I will" (*Dabis? Dabo*). "Will you promise? I will" (*Promittis? Promitto*). "Do you pledge yourself? I do" (*Fidepromittis? Fidepromitto*). "Do you guarantee? I

do" (*Fidejubes? Fidejubeo*). "Will you do it? I will" (*Facies? Faciam*).

93. The verbal contract in the form *Dari spondes? Spondeo* is used only by Roman citizens; the other forms, however, belong to the law of nations (*jus gentium*), and are therefore binding upon all men, whether they be Roman citizens or foreigners. And even if they are spoken in the Greek language . . . they are binding between Roman citizens, provided that both the contracting parties understand Greek; similarly, too, if spoken in Latin they are binding between foreigners, provided that the foreigners both understand Latin. The form of verbal contract *Dari spondes? Spondeo* is so peculiar to Roman citizens that it has not even a precise equivalent in Greek into which it can be translated, although it is said to have been imitated from a Greek phrase.

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97. If the subject of a contract by express words is something of which the legal ownership cannot be transferred, the contract (*stipulatio*) is void, as for example, if anyone stipulated that he would give a freeman whom he thought to be in servitude, or a dead slave whom he thought was alive, or a piece of land sacred to the gods, or dedicated for religious purposes,[26] that he thought was subject to man's jurisdiction.

97*a*. So too if anyone should contract for something which cannot exist in the realms of nature, as, for example, a creature half horse, half man (*hippocentaurus*), the stipulation is similarly void.

98. The same law applies if a man makes his contract subject to a condition which is impossible of performance, for example, when the condition is "if he should touch the sky with his finger," the contract is void. Though with regard to a legacy left under an impossible condition the teachers of our school think such a gift ought to be regarded as being unconditional; the authorities of the other school, however, think such a legacy just as ineffectual as a contract so conditioned. And it is indeed difficult to find a sufficient reason for making any difference in these two cases.

[26] And therefore not alienable. See as to *res sacra* and *res religiosa*. *Gai.* II. 4 *ante*.

99. Further, the contract (*stipulatio*) is void if a man, ignorant that a certain thing belonged to him, stipulated that he should have it; for what is already fully a man's own cannot be given to him.

100. Then again a contract (*stipulatio*) of this kind—namely, when anyone stipulates for something in the form: "Do you undertake it shall be given after my death?" (*Post mortem meam dari spondes?*), or in the form: "Do you undertake it shall be given after your death?" (*Post mortem tuam dari spondes?*) is void; but it is binding and valid if the stipulation be: "Do you undertake it shall be given when I die?" (*Cum moriar, dari spondes?*) or if it be: "Do you undertake it shall be given when you die?" (*Cum morieris, dari spondes?*), that is to say, so that the obligation becomes operative at the last moment of the stipulator's or promissor's life; for it was not considered fitting that a contract should first begin to be binding upon the heir. Again, we cannot make a binding stipulation in the form: "Do you undertake it shall be given on the day before my death?" or "the day before your death?" (*Pridie quam moriar, ant pridie quam morieris dari spondes?*) because it is only possible to know what "the day before any man's death" is, when his death has in fact taken place; further, when the death has taken place, performance of the contract is referred back to a past event, and it becomes somewhat similar to this form: "Do you undertake it shall be given to my heir?" (*Heredi meo dari spondes?*), which is clearly void.

101. Whatever has been said about contracts conditioned upon the death of either party, must also be understood to apply to those conditioned upon a loss of status (*capitis deminutio*).[27]

102. A stipulation is void, too, if anyone has given an answer which is not exactly referable to the obligation he

[27] The *caput* or legal personality of individuals was regarded by the Romans as involving three elements; in the first place, liberty (*libertas*), in the second, citizenship (*civitas*), and in the third, family rights (*familia*). The loss of any one of these effected a *capitis deminutio*, which was described as *maxima*, *media*, or *minima*, according as it involved the loss of the first, second, or third of these elements.

was asked to undertake, as for instance, if I stipulate that you should give me ten *sestertia*, and you promise me five, or if I stipulate without any condition at all, and you make your promise a conditional one.

103. So too a stipulation is not binding if we stipulate for something to be given to a man who does not exercise jurisdiction [28] over us. Hence a question has been raised, if anyone should stipulate that something should be given to himself and to a person to whose jurisdiction he is not subjected, how far such a stipulation is valid. The opinion in our school is that the stipulation is good with regard to the whole subject matter of the contract, and that it ought to be paid in full to him alone who contracted, just as if a third party's name had not been added. But the authorities of the opposing school think that one-half should be paid to him who contracted, but that with regard to the other half the contract is void.

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104. Furthermore, a stipulation by which I stipulate with one who is subjected to my jurisdiction is invalid, as it is if he, in fact, stipulate with me. A slave however, and a person subject to the *mancipium*,[29] a daughter (*filia familias*), and a woman subject to *manus* [29] are not only unable to be under obligation to those who exercise jurisdiction over them, but may not even be under obligation to any other person.

105. It is perfectly clear that dumb mutes can neither stipulate nor promise. The same rule too applies with regard to deaf people; for the reason that the man who stipulates ought to hear the words used by the promissor, and the man who promises ought to hear the question asked by the stipulator.

106. A person of unsound mind cannot carry on any business transactions, because he does not understand what he is doing.

107. A ward (*pupillus*) can validly negotiate any business, provided that the authorisation (*auctoritas*) of his tutor be obtained whenever it be necessary, as for instance,

[28] That is, *potestas*.

[29] See *Gai.* I. 49, note *ante*.

when the ward desires to subject himself to an obligation; for he can bind other people to be liable to him without being so authorised by a tutor.

108. The same law applies with regard to women who are subject to tutelage (*in tutela*).

109. But what has just been said in reference to a ward (*pupillus*) is only true with regard to one who has already acquired some capacity to understand matters commercial; for an infant, or one who is little more than an infant (*infanti proximus*), is not very different from a person of unsound mind, since a ward of such a tender age has no understanding of what he does. With regard, however, to these latter,[30] an interpretation of the law more favourable to them is accepted for the sake of convenience.

110. We can, however, in stipulations employ a third party, who stipulates for the same thing, whom we usually designate a co-stipulator (*adstipulator*).

111. And in this event an action may be brought by him upon the contract just as it can be brought by a stipulator, and payment may properly be made to him too; but by means of an action called the *actio mandati*, he will be compelled to hand over to the stipulator whatever he has in this way recovered.

112. Moreover, the co-stipulator can make use of a different form of words for his contract to the form used by the stipulator. So if I have made a stipulation, say, for example, in the form: "Do you undertake it shall be given?" (*Dari spondes?*) the co-stipulator may use the form: "Do you pledge your faith for the same?" (*Idem fide tua promittis?*), or the form: "Do you guarantee it?" (*Idem fide jubes?*), or the matter may be the other way about.

113. Furthermore, the co-stipulation may be made for less than the stipulation itself, though not for more. So if I stipulate for ten *sestertia*, the co-stipulator may ask for five *sestertia* only; but, on the other hand, he cannot make his co-stipulation for more than ten *sestertia*. So too if I stipulate unconditionally, my co-stipulator may contract subject to a condition; but when my contract is conditional,

[30] This appears to refer to the class *infanti proximus*.

his may not be unconditional. The words less (*minus*) and more (*plus*) must be understood to apply not only in regard to quantity, but also with respect of time; "more" in the matter of time is to give something immediately, "less" to give at a future date.

114. With regard to this right of employing co-stipulators certain things peculiar to it are to be noticed. For the heir of a co-stipulator acquires no right of action. Again, a slave by acting as a co-stipulator effects nothing, though in all other cases he acquires on behalf of his master by means of a stipulation. Such too is the law, according to the better opinion, with regard to a man who is subject to the *mancipium*, for he is, in fact, in an analogous position to that of a slave. But the man who, while subjected to his father's jurisdiction (*potestas*) makes a contract of co-stipulation, does effect something, but he does not acquire on behalf of his father, although in all other cases he does acquire on his behalf by stipulating; and indeed he is not competent himself to bring an action, unless and until he has ceased to be subject to the parental *potestas* without suffering any loss of status thereby, as for instance, by reason of his father's death, or because he has himself been inaugurated as a priest of Jove. These remarks must also be understood to apply to a daughter (*filia familias*) and to a woman subject to *manus*.

115. On behalf of the man who makes the promise, it is customary for others to be bound also as sureties, and of these sureties, some are called *sponsores*, others *fidepromissores*, and others *fidejussores*.[31]

116. A sponsor is interrogated in the following form: "Do you undertake that the same thing shall be given?" (*Idem dari spondes?*); the fidepromissor in this form: "Do you pledge yourself for the same thing?" (*Idem*

[31] These are the three kinds of sureties that are made use of to guarantee an *obligatio verborum*. The sponsor was used between Roman citizens only; the fidepromissor between Romans and aliens, and these two were used exclusively for contracts made by express words. A fidejussor was used for any of the four kinds of contracts referred to in this commentary [and see § 118 *et seq. post*].

fidepromittis?): and the fidejussor in the form: "Do you guarantee the same thing?" (*Idem fide tua esse jubes?*). And later we shall see by what name those sureties can appropriately be described who are asked: "Will you give the same? Will you promise the same? Will you do the same?" (*Idem daris? Idem promittis? Idem facies?*)

117. The general practice is to join a sponsor, fidepromissor or fidejussor with the promissor, when we desire to obtain greater security for the performance of our contract; but a co-stipulator is, however, used almost exclusively when we stipulate for something to be given to us after death; for inasmuch as by stipulating for something to be given to us then we effect nothing, a co-stipulator is added, so that he can bring an action after the stipulator's death; and if in the action he shall have recovered anything, he is liable to a process called an *actio mandati* to compel its restoration to the stipulator's heir.

118. The sponsor and the fidepromissor occupy very similar positions, while that of a fidejussor is widely different.

119. For the former can assent to no obligations except those made by express words (*verborum obligationes*), although sometimes the person who promised was not bound himself, as for example, if the promise was made by a woman, or by a ward without her tutor's authorisation (*auctoritas*), or if someone had promised that a certain thing should be given after his death. But there is some doubt as to whether a sponsor or a fidepromissor may be made liable if a slave or a foreigner (*peregrinus*) has put himself under obligation. A fidejussor, however, can be party to any obligation, whether it be contracted by conduct (*re*), by express words (*verbis*), by writing (*litteris*), or by consent (*consensu*). And it makes no difference whether he be participating in an obligation arising under the civil law (*jus civile*) or in an *obligatio naturalis* [32]; so much so is this the case that a fidejussor may be bound on behalf of a slave, and this whether it be a stranger who accepts the fidejussor from the slave, or his owner for something that is owing to him.

[32] See *Dig.* XLV. i. 1, 2, note *infra*.

120. Further, neither the heir of a *sponsor* nor of a *fidepromissor* is bound, unless maybe the question arise in reference to an alien *fidepromissor*, and his state makes use of a different law; but in the case of a *fidejussor* the liability extends also to his heir.

121. Again the *sponsor* and *fidepromissor* are each freed from their contract after two years under the *lex Furia*, and however many there be of them at the time when the claim to recover the money can be enforced, the burden of the obligation is divided between them into just so many shares, and each one is summoned for his appointed share; the liability of the *fidejussor* on the other hand is permanent and continuing, and, however many of them there be, each is held bound for the full amount. So a creditor was at liberty to claim the whole sum from which of them he chose. But at the present day, in consequence of a letter (*epistula*), of the late Emperor Hadrian, a creditor is compelled to claim a share from each *fidejussor* who is in any degree solvent. In this respect, therefore, this letter differs from the *lex Furia*, because if a *sponsor* or *fidepromissor* is not solvent, the burden of his share is not added to that of the others, whereas if a *fidejussor* be insolvent his share also is borne by the others. But the *lex Furia*, however, applies only to Italy, and it happens, therefore, that in the other provinces a *sponsor* or a *fidepromissor* would have a continuing liability, just as a *fidejussor* has, and each would be under obligation for the whole sum, were it not for the fact that the letter of the late Emperor gives relief to them also in some degree.

122. Moreover, the *lex Apuleia* introduced a kind of partnership amongst *sponsores* and *fidepromissores*. For if any one of them had paid more than his own share it ensured him a right of action against all the others for whatever he had so paid in excess of his share. This law was passed before the *lex Furia* and at a time when all sureties were under obligation for the whole debt. From this a question has been raised as to whether the benefit of the *lex Apuleia* still continued after the *lex Furia* was passed; and clearly beyond the province of Italy it does continue. For the *lex Furia* only applies to the province

of Italy, while the *lex Apuleia* is binding on the other provinces. But whether the benefit of the *lex Apuleia* survives also in the province of Italy may well be doubted. The *lex Apuleia* does not apply to *fidejussores*. And, as a consequence, if a creditor has recovered the whole debt from one *fidejussor*, the loss will be his alone, provided, of course, he for whom he was surety is not able to pay. But, as is perfectly clear from what has been said above, the surety from whom a creditor claims the whole debt can, under the late Emperor Hadrian's letter, insist that the right of action against him be limited to his proportionate share.

123. It was enacted too by the *lex Cicereia*, that anyone who is securing himself with *sponsores* or *fidepromissores*, should first publicly state and declare, both the nature of the obligation for which he required sureties, and also how many *sponsores* or *fidepromissores* he was prepared to accept with regard to that obligation; and if he did not first declare it, it was open to the *sponsores* or *fidepromissores* within thirty days to demand a preliminary trial, to decide whether he did first make the declaration required by that law; and if it was decided that no such declaration was first made, the sureties were released. There is no reference to *fidejussores* in this statute; but in practice it is usual to first make the declaration, even if *fidejussores* are to be taken as sureties.

124. The benefit of the *lex Cornelia* is, however, common to all forms of suretyship. By this law a surety is forbidden to be bound on behalf of the same debtor to one particular creditor for any sum of money lent (*pecunia credita*) that exceeds 20,000 *sestertia* in any one year; and even if a *sponsor* or *fidepromissor* binds himself for a greater sum, as, for instance, for 100,000 *sestertia*, he is only liable up to 20,000. But when we refer to money lent (*pecunia credita*), we mean not only what was advanced on loan, but all that which, when the contract was made, was certain to become due—that is to say, all liabilities which become due in consequence of the contract without any express condition—so money, which we stipulate to be paid on a certain date, is reckoned in the total, because it is certain to become due, although it may only be claimed

in action after some time has elapsed. And under the term money (*pecunia*), all sorts of things are intended to be referred to in this statute; so that if a stipulation concerns wine or corn, or if we stipulate for an estate or a slave, the statute must be observed.

125. In certain cases, however, the statute itself allows contracts of suretyship to an unlimited extent, as for instance, when a surety is given in reference to a dowry, or for what is due under a will, or when an arbitrator (*judex*) orders a surety to be given. In addition to this, it is enacted by the law concerning the twentieth part of an inheritance that in reference to the suretyship referred to in that law, the *lex Cornelia* is to have no application.

126. In this respect also the position of all sureties, whether *sponsores*, *fidepromissores*, or *fidejussores* is identical, —namely, that they cannot be made liable to owe any greater sum than is owed by their principal on whose behalf they have contracted. But on the contrary, they can make themselves liable for a smaller sum, just as is the case in reference to co-stipulators; for a surety's liability, like a co-stipulator's, is accessory to the principal's liability, and the obligation of an accessory cannot be greater than that of a principal.

127. In this respect also the position of all is equal— namely, if the surety has paid anything on behalf of his principal, he has a remedy to recover it from him by means of the process called an *actio mandati*; and a *sponsor* has in addition a right of action peculiar to himself for double that amount, which is called an *actio depensi*.

128. An obligation created by writing (*obligatio litteris*) arises, for example, in the case of duplicated entries (*nomina transcriptitia*). There are two methods by which such entries may be made, either from the subject of the contract to the person of the debtor (*a re in personam*), or from one debtor to another (*a persona in personam*).

[33] An entry in the creditor's account-book assented to by the debtor constituted a written contract for the amount of the entry; a corresponding entry was usually made in the debtor's books also, and if so made, was conclusive evidence of his assent to the creditor's entry.

129. A transfer of an entry *a re in personam* takes place for instance, when I enter as paid out to you whatever you may in fact owe me as a result of a sale or a hiring or a partnership.

130. One made *a persona in personam* arises, for example, when I enter as paid out to you what Titius owed to me, this can only happen of course if Titius has put you forward in lieu of himself as debtor to me.

131. But the case is different with regard to what are called ready-money entries (*nomina arcaria*). For in these cases the obligation arises from the conduct (*re*), and not from the writing (*litteris*), since the obligation only arises if the money is in fact counted out; and it is the conduct of the parties in counting out of the money that creates the obligation. Hence it is correct to say that ready-money entries (*nomina arcaria*) themselves create no obligation, but furnish evidence that an obligation has been created.

132. For the same reason it is not correct to say that aliens (*peregrini*) are also liable under ready-money entries, because it is not the entry itself, but the counting of the money that puts them under obligation; and this kind of obligation is one that belongs to the law of nations (*jus gentium*).

133. Whether duplicated entries (*nomina transcriptitia*) are binding upon aliens is a question that has properly been doubted, because an obligation of this kind pertains to some extent to the civil law (*jus civile*); and this was Nerva's opinion. But Sabinus and Cassius thought that if such an entry was made *a re in personam* it was binding even upon an alien; if however the entry was *a persona in personam*, aliens were not bound.

134. Finally, contracts in writing (*obligationes litteris*) are also made by bonds (*chirografa*) and promissory notes (*syngrafa*)—that is to say, documents in which a man acknowledges a debt or promises to give something, provided, of course, no stipulation has been made in respect of the same matter, and this kind of contract is peculiar to aliens.

135. Contracts by consent (*obligationes consensu*) arise

in buying and selling (*emptio, venditio*), in letting and hiring (*locatio, conductio*), in partnerships (*societates*), and in agency (*mandatum*).

136. Contracts made in these ways are described as contracts by consent (*obligationes consensu*), because no form either of words or of writing is required, but it is sufficient that those who are parties to the agreement have consented to it. Transactions of this sort may, therefore, be carried out without the parties being present, either by means of letters for instance, or by means of messengers; whereas a verbal obligation (*obligatio verborum*) cannot be made between absent parties.

137. So, therefore, in contracts of this kind, the parties are mutually bound to act justly and with fairness towards each other, whereas in verbal contracts (*obligationes verborum*) one stipulates and the other promises, and in duplicated entries the one party binds the other by his entry, and that other is bound by assenting to it.

138. And money can be entered as paid to one who is absent, although a verbal obligation cannot be contracted with an absentee.

I. Concerning Purchase and Sale

139. A contract of purchase and sale (*emptio, venditio*) is completed when an agreement has been come to on the question of price, although the money has not yet been counted out, and although no earnest (*arra*) has been given to bind the bargain. For what is given as earnest money is evidence that a contract of purchase and sale has been concluded.

140. The amount of the purchase money ought to be fixed. For if the agreement between the parties was that something should be bought for as much as Titius thought it to be worth, Labeo was of opinion that such an agreement did not constitute an enforceable contract; and Cassius was of this opinion. Ofilius, however, thought that a sale had been effected; and Proculus followed his opinion.

141. The purchase price ought to consist of money.

For whether the price can consist of anything else, whether for example a slave, or a garment, or a farm can be the price of some other thing, is a much disputed point. In our school it is held that other things than money may be given as the price; and this accounts for the common opinion that purchase and sale is contracted by bartering goods, and that this is the oldest method of conducting the business of purchase and sale; and in support of this opinion they quote from the Greek poet Homer.

. . . . . .

The authorities of the opposing school however disapprove this opinion, and hold that barter of goods is one thing and that purchase and sale is another and a different thing; for were this not so it would be impossible to determine which of the articles bartered is the thing sold and which is given as the price; and, furthermore, it would be absurd to have to regard each article both as the subject of the sale and as the purchase price. But Caelius Sabinus, in answer to this contention, says that if you have something to sell, say a farm, and I accept it and give, let us say, a slave in exchange for it, the farm is considered to be sold, and the slave is considered to be paid as the price so that the farm may be received.

142. The contract of letting and hiring (*locatio et conductio*) is governed by similar principles; for unless the price is definitely agreed upon, a contract of hiring is not considered to have been made.

143. For this reason it is a question, whether a contract of hiring is effected if the price is left to the arbitration of a third party, for instance, at whatever price Titius decides upon; on this account therefore if I have given clothes to a fuller to clean and look after, or to a tailor to repair, without agreeing any price beforehand, but on the understanding that as much shall afterwards be paid as we shall together agree, it is a question whether a contract of hiring has been made.

144. Similarly if I give you something to use and in return receive the use of something else from you, the same doubt arises.

145. Now the contracts of purchase and sale, and of

hiring are considered to be so similar to each other that it used in some instances to be a matter of doubt, whether a sale had been contracted, or a hiring, for example in the case when property had been let on hire for ever. This happened in the case of estates owned by municipalities (*praedia municipium*), which are leased on the understanding that so long as the rent (*vectigal*) is paid, neither the tenant (*conductor*) nor his heir should be ejected from the land; and the general opinion is that this is a contract of hiring.

146. So too if I let you have some gladiators upon the understanding that I shall receive twenty *denarii* for the labour of each of them that comes scathless through the fight, and 1000 *denarii* for each that is slain or wounded, the question arises, whether this is a contract of sale or a contract of hiring. The better opinion seems to be, that those that come forth unscathed are considered as having been hired, while those that are killed or wounded are held to have been sold; it appears therefore that it depends upon chance, almost as if the question of sale or hire had been made dependent upon a condition. For nowadays there can be no doubt that things can either be sold or hired upon condition.

147. Again, if I have agreed with a goldsmith, that he is to make me a ring from his own gold of a particular weight and shape, and that he is to receive, let us say, 200 *denarii*, a question arises as to whether this is an agreement for a sale or a hiring. Cassius says that as regards the materials, the contract is one of sale, but as regards the work and labour, one of hiring; but the generally accepted opinion is that the contract is one of hiring. If I have given him gold of my own and agreed a price for his labour, the contract is held to be a hiring.

148. It is the practice to enter into agreements of partnership (*societas*) either in regard to all our goods or with regard to one particular business, such as buying and selling slaves.

149. There used to be a great deal of controversy as to whether a partnership can be made on the terms that the partner who takes the greater share of the profits should bear the smaller share of the losses. Quintus

Mucius thought such an agreement was against the whole nature of partnership. But Servius Sulpicius, whose opinion ultimately prevailed, was so convinced that such an agreement for partnership was valid that he said that one could even be made so that one partner was not responsible for any part of the losses, but was entitled to a share of the profits, provided that his services were estimated so highly that it was reasonable for him to be admitted a partner on those terms. For it is agreed that a partnership may be constituted, so that one partner provides all the capital, and the other none of it, and yet that the profits shall be shared between them; for the services rendered by the one partner are often the equivalent of the capital provided by the other.

150. And this much is certain, that if there is no express agreement between them as to sharing profit and loss, then the profit and loss are borne by both in equal shares; and if shares have been agreed upon in respect of the one, for instance say in respect of the profits, but not specified in respect of the other, the division will be in the same proportion in respect of the sharing which was not agreed upon.

151. A partnership lasts so long as the partners consent to its continuance; and when one declares the partnership terminated it is dissolved, though clearly if a partner puts an end to a partnership, in order to acquire for himself some profit that he thinks is likely to accrue, as for instance if a man, partner with me in respect of all our dealings (*socius totorum bonorum*), terminates the partnership just when he was left heir to someone so that he should take all the profit of the inheritance for himself, he is obliged to share the profit so made; if however he makes some other profit, that he has not schemed for, it belongs to him alone. Everything, however, that is acquired after the dissolution is granted to me alone.

152. A contract of partnership is also dissolved on the death of one of the partners, for whoever contracts a partnership chooses for himself a particular person as his partner.

153. It is also said that partnership agreements are

dissolved by a loss of status (*capitis deminutio* [34]) of one of the partners, for with regard to the legal personality a loss of status is the equivalent of death ; but if the partners agree still to remain in partnership a fresh partnership agreement is considered to have been made.

154. So too the partnership is dissolved if the property of one of the partners be sold either for debts due to the public authorities, or for debts due to individuals. But this partnership too of which we are speaking, may be contracted simply by consent, and is governed by the law of nations (*jus gentium*) ; and so it is an established institution depending on ordinary business relations amongst all peoples.

155. A contract of mandate (*mandatum*) is made, whether we issue the mandate for our own affairs or for someone else's ; consequently I enter into a mandate (*obligatio mandati*) with you, whether I appoint you to conduct a business matter of my own, or of another person, and we are each held bound to the other in good faith for whatever I ought to pay you or you ought to render to me.

156. Now if I give you a mandate for your own affairs only, it is void ; for whatever you would do on your own behalf, should be done in response to your own opinion, and not at my bidding ; and so if you had money of your own lying idle at home, and I advised you to lend it out at interest, even if you gave it on loan to one from whom you failed to recover it back, you would not even then have any remedy against me on an action of mandate (*actio mandati*). So too, if I advise you to make a particular purchase, and it turns out unprofitable for you to have bought it, I am not liable to you in an *actio mandati*. And so far is this doctrine carried, that there is some doubt whether the man who has given you a mandate to lend money to Titius at interest is liable to an *actio mandati*. Servius thinks that such a man incurs no liability ; and he did not think that any contract was made in this case any more than in the case where general advice to lend his money at interest was given to a man. But our school follows the opinion of Sabinus which is opposed to that of

[34] See *Gai.* III. 101, note *ante*.

Servius, because, had no mandate been given to you, nothing would have induced you to trust Titius.

157. It is clearly established, that if anyone gives a mandate for something to be done which is contrary to good morals, no contract is made, as for instance if I give you a mandate to steal from Titius or do him some injury.

158. So too if a mandate is given me to do something after my own death, the contract is void, for it is generally admitted that no obligation can first be enforceable against the person of the heir.

159. But a mandate binding at its inception is rescinded, if it is revoked, while the subject matter of it remains unaffected (*res integra*).

160. So, too, if while the mandate is still unexecuted, either of the parties to it—that is to say, the one who gave the mandate, or the one who accepted it—should die, the contract is dissolved; though for the sake of expediency the accepted opinion is that if, after the man who gave the mandate has died and while I am still in ignorance of his death I shall have carried out his instructions, an *actio mandati* is open to me; otherwise a reasonable and probable ignorance will bring me loss. And in a somewhat similar way it is the generally accepted opinion, that if a debtor of mine should make payment to my steward after he (the steward) has been released and in ignorance of that fact, he is discharged of his debt, although of course by the strict letter of the law he cannot be discharged by that, because he has paid some other person than the one he ought to have paid.

161. But if a man, to whom I have given a valid mandate, acts in excess of his authority, an *actio mandati* against him is open to me in so far as it was to my interest that the mandate should be strictly complied with, and provided that it could have been strictly complied with; but he has no right of action against me. So if I have given you a mandate, let us say to buy me a farm for 100 *sestertia*, and you have bought it for 150, you will have no right to an *actio mandati* against me, even if you are willing to let me have the farm for as much as I authorised you to buy it for; Sabinus and Cassius were strongly of this

opinion. But if you buy it for less than I authorised you to pay, you have, of course, a right of action against me, because whoever authorises someone to buy for 100 *sestertia* is presumed to authorise a purchase at any less price, should it be possible.

162. Finally, it must be understood that whenever I give out something to be done for nothing, under such circumstances that, had I agreed a price, the contract would have been a hiring, as for example if I give a fuller clothes to clean and take care of, or a tailor clothes to mend, an *actio mandati* lies.

163. Now that the different kinds of obligations that arise from contracts (*obligationes ex contractu*) have been explained, we must point out that we not only acquire property through our own selves, but also through those persons that are subjected to our *potestas* or *manus* or who are *in mancipium* to us.[35]

164. We acquire also through freemen, and the slaves of other people, whom we honestly (*bona fide*) believe to be our slaves; but only in two cases—namely, if they acquire anything as a result of their own labour, or through dealing with our property.

165. We also acquire property in a similar way, and in the same two cases, through a slave over whom we exercise a right of usufruct.

166. But the man who owns a slave in quiritian ownership (*jus quiritium*) only, although he be in fact his lord, is supposed to have less right to property he has gained than has the usufructuary owner and the man who has possession of him in the *bona fide* belief that he is one of his own slaves. For the opinion prevails that the slave cannot in any case acquire property for his quiritian owner; so much so indeed, that some authorities think that even if the slave has stipulated for something to be given to him, mentioning his name, or has accepted something given in *mancipium* on his behalf, nothing is acquired for him.

167. It is clear that a slave jointly owned acquires for his masters in proportion to their shares of ownership in

[35] See hereon note to *Gai.* I. 49 *ante*.

him, with this exception however, that by stipulating in the name of one of them, or by accepting something conveyed by the ceremony of *mancipium* on behalf of one of them, he acquires for the one named alone, as for example, when he stipulates in these words: "Do you undertake it shall be conveyed to my master Titius?" (*Titio domino meo dari spondes?*); or when he receives something by the *mancipium* thus: "I declare that this belongs in quiritian ownership to my master Lucius Titius, let it be considered as purchased on his behalf with this piece of bronze and these brazen scales" (*Hanc rem ex jure quiritium Lucii Titii domini mei esse aio, eaque ei empta esto hoc aere aeneaque libra*).

167*a*. There is some doubt as to whether a slave who acts in acquiring property upon the express order of one of his owners, produces the same result as he does when he mentions one of them by name. The authorities of our school think the property acquired is acquired for him alone who gave the order, just as if the slave had stipulated for him alone by name or had accepted something in *mancipium* on his behalf; in the opposing school, however, the opinion held is that the property is acquired for each of his owners, just as it would have been if no order had ever been given.

168. Now an obligation is discharged principally by paying what is due under it. And on this point a question has been raised as to whether, when a debtor, with his creditor's full consent, has paid something instead of the thing that was due, the obligation is thereby discharged in law, as the teachers of our school hold, or whether he remains liable according to the strict letter of the law, but is entitled to resist any claim against him by a defence of fraud (*exceptione doli mali*) as the authorities of the other school think.

169. An obligation is also dissolved by a formal discharge (*acceptilatio*). *Acceptilatio* is a kind of fictitious payment. If you desire to release me from paying what I owe you under a verbal contract (*obligatio verborum*), it can be done if you permit me to speak the following formula:— "Have you received what I promised you?" (*Quod ego*

tibi promisi, habesne acceptum?), and you answer: "I have received it" (*Habeo*).

170. As we have already indicated, only those obligations which derive their binding force from a form of words (*obligationes verborum*) can be discharged in this manner, and no others; for it was thought to be fitting that a contract which is constituted by a particular form of words should be capable of being discharged by another form of words. And if anything is owed under a contract of some other sort, the liability can be expressed in the form of a stipulation (*stipulatio*), and can then be dissolved by means of this formal discharge (*acceptilatio*).

171. Now although we have said that *acceptilatio* is effected by means of a fictitious payment, yet a woman cannot carry it out without her guardian's authorisation (*auctoritas*), despite the fact that she can accept a real payment without any such authorisation.

172. Further, part payment on account of something owing can properly be made; but whether a formal discharge (*acceptilatio*) can be validly made as to a part of the debt only is a matter of doubt.

173. There is also another method of fictitious payment which is carried out by means of a piece of bronze and a pair of scales (*per aes et libram*); this particular method is resorted to in a certain class of cases, as for instance, when something is owed from a contract which was originally carried out *per aes et libram*, or in the case of a debt due under a judgment.

174. To carry out this method of release not less than five witnesses and a balance holder must be present; then the debtor who is to be released from his bargain ought to say: "What I have been adjudged to pay you is so many thousand *sestertia* I hereby pay you, and I release myself from my liability to you with this piece of bronze and this pair of brazen scales. I make payment to you first and last in the balance, according to the law of the State" (*Quod ego tibi tot milibus condemnatus sum, me eo nomine a te solvo liberoque hoc aere aeneaque libra; hanc tibi libram primam postremamque expendo secundum legem publicam*). Then he strikes the scales with the

piece of bronze and gives it to the creditor who is releasing him, as if it were given for the purpose of payment.

175. Similarly a legatee may release an heir in this same way from paying a legacy left to him in the method known as *per damnationem*; though, of course, while the debtor signifies that he was condemned to pay by the judge, the heir says that he was under an obligation to give the legacy by the will. An heir can, however, only be released by recourse to this method from the payment of legacies which consist of things that can be weighed or counted, and then only if the quantity of them be certain. But some people think this release also extends to include things that can be measured.

176. Further, a contract can be dissolved by means of a novation (*novatio*); as, for example, if I stipulate that what you owe me should be paid by Titius; for upon the intervention of a new party a fresh obligation is created and the earlier one is dissolved and merged into the later one, and so effectually indeed, that it sometimes happens that although the later stipulation is void, yet the earlier one is nevertheless dissolved by the operation of the law of novation; as for example, if I have stipulated that what you owe me should be paid by Titius after his death, or by a woman or a ward unauthorised by their guardians so to contract; in such a case I lose the property; for the debtor under the first obligation is released, while the later obligation has no binding force. This law does not however apply if I have stipulated from a slave; for in such a case the first man is still held obliged, just as he would be if I had not afterwards stipulated with anybody.

177. And if it is with the same person that I make the later stipulation, then there is a novation (*novatio*) if there be any new term in the later contract, as if perchance a condition or a time for completion, or a surety (*sponsor*) [36] be added or withdrawn.

178. But what has just been said in reference to a surety (*sponsor*) is not a settled point. For the authorities of the opposing school hold that the adding or withdrawing of a surety does not effect a novation.

[36] See *Gai.* III. 115 *et seq.*

179. When it is said that if a condition be added, a novation takes place, this must be understood to mean that there is in fact novation if the condition be carried out; though, of course, if it fails, the earlier obligation still remains. Now let us see whether he who brings an action in that event can be defeated by the defence of fraud (*exceptio doli mali*) or concluded agreement (*pacti conventi*), because it would appear that the parties did this thing with the intention that an action should lie if the condition of the later stipulation should be performed. Servius Sulpicius, however, thought a novation took place immediately and while the condition was still unperformed, and that if the condition was not fulfilled no right of action on either contract would lie, and in that way the property would be lost to the stipulator; and it was in consequence of this that he held, that if anyone had stipulated from a slave for what Lucius Titius owed him, there was a novation and the debt was lost, because there was no right of action against the slave. But in both cases the law in use is different, and novation does not operate in these cases any more than it would in the case where I stipulate for what you owe to me by means of the formal word *spondes* from an alien, with whom Roman citizens have not the right of contracting by means of the *sponsio*.[37]

180. An obligation is also discharged by joinder of issue (*litis contestatio*), provided the action is fought by a statutory proceeding (*legitimo judicio*). For then the original obligation is dissolved, and the defendant begins to be liable by the joinder of issue. And if the verdict goes against him, the effect of the joinder of issue ceases, and his liability under the judgment commences. Hence the saying of the older writers that, before joining issue the debtor's obligation is to pay; after joining issue to submit to judgment, and after judgment is decreed, to carry it out.

181. So it happens that if I have once claimed a debt

[37] That is in the form "*Dari spondes?—Spondeo*," which could only be employed between Roman citizens; see *Gai.* III. 93 *ante*.

by a statutory proceeding (*legitimo judicio*), I cannot subsequently bring an action to enforce the same right, because to formally claim that such and such a sum ought to be given to me (*dari mihi opportere*) is useless, because it has ceased to be owing to me in consequence of the joinder of issue (*litis contestatio*). Although if my claim lies within the jurisdiction (*imperium*) of a magistrate it is otherwise ; for then the obligation itself continues, despite the claim, and therefore I can afterwards bring an action to enforce the same right, though I ought to be defeated by the defence of a previous adjudication (*exceptio rei judicatae*) or that the matter has been already before an arbitrator (*exceptio rei in judicium deductae*). What matters are appropriate to the statutory proceedings, and what are within the jurisdiction of magistrates, will be set forth in the subsequent commentary.

FOURTH COMMENTARY

103. All actions are either statutory (*legitimo jure*) or else are within the jurisdiction (*imperium*) of magistrates.

104. Statutory proceedings are applicable to causes of action arising within the city of Rome, or within one mile of it, between Roman citizens and tried before one arbitrator (*judex*); and under the *lex Julia* these actions are barred unless adjudicated upon within a year and six months. And this accounts for the common saying, that under the *lex Julia* the life of an action is but eighteen months.

105. Actions before several arbitrators (*recuperatores*) [38] and those before a single arbitrator (*judex*) in which an alien participates either as arbitrator or litigant, are included in the scope of the magisterial authority (*imperium*); causes of action, too, that arise farther than a mile beyond the city of Rome either between Roman citizens or foreigners are in the same position. Proceedings of this kind are described as being within the scope of a magistrate's authority (*imperium*), because their life is co-extensive with the continuance of the *imperium* in the magistrate who authorised them.

[38] A *recuperator* was one of the four kinds of arbitrators used to determine issues of fact in Roman lawsuits. There were, as a rule, three of them at least as a court in each case; hence the distinction here that statutory proceedings are decided by an arbitrator (*judex*) while those held before *recuperators*—that is to say, before more than one arbitrator—are considered as under the scope of the *imperium*. The origin of the *recuperators* or what class of cases they tried, seems to be obscure.

THE DIGEST

BOOK XLV.

1. De Verborum Obligationibus

(*Concerning Contracts made by express Words*)

1. *Ulpianus libro quadragesimo octavo ad Sabinum.* A stipulation [1] (*stipulatio*) cannot be made unless both parties to it speak; therefore neither the dumb, nor the deaf, nor infant children, can contract by *stipulatio*; nor can an absent person either, for the contracting parties ought to hear each other. Therefore, if any one of the above persons desires to contract by means of a *stipulatio*, let him do so through the agency of a slave who is present, and acquire through him an action on the contract. Similarly if any one of them wishes to be under an obligation, let him authorise his slave and he will be bound to the extent of that authority. (1) If a man who is present has made a formal demand and has gone away before the reply is given him, he renders the stipulation useless; if, however, he has asked when present, then has gone away and on his return has received the answer, he makes a binding contract; for the interval during which he is absent has not rendered the obligation void. (2) If a man asks in the form, Will you give? (*Dabis?*) [2] and the other party answers, Why not? (*Quid ni?*) the latter is certainly bound; but it is otherwise if, without speaking, he had simply nodded.

[1] See *Gai.* III. 92 *et seq. ante.*

[2] *Dare* has a technical signification and when used in connection with stipulations means to give so as to make the recipient full legal owner. It is thus almost equivalent to the English word "convey."

For he who nods in that way is not held liable either by the civil law or by natural obligation (*obligatio naturalis*) [3]; and as a consequence it has been said, and rightly said, that the principal is not bound nor is his surety (*fidejussor*) [4] either. (3) If anyone has been asked unconditionally (*simpliciter*) and has answered "If such and such a thing be done, I will give" (*Si illud factum erit, dabo*), there is clearly no contract; or, if he was asked to give, "Before the first of the fifth month" (*Intra kalendas quintas*), and has answered "I will give on the Ides" [5] (*Dabo idibus*), he is similarly not bound; for he did not answer in the words of the question. And conversely, if one who has been asked conditionally has given an unconditional reply, it must be held that he is not liable. When anything is added to, or withdrawn from the obligation (by the answer), it must always be accepted that the contract is vitiated, unless the stipulator has immediately approved the answer as altered; and in that event another stipulation altogether is considered to have been made. (4) If in reply to my demand for "ten" you promise by your answer "twenty," it is agreed that a contract is made only for ten. In the contrary case also when I ask "twenty" and you promise "ten" a contract will be made for ten only; for although the sums (asked and promised) ought to correspond, yet it is perfectly clear that ten is comprised in twenty. (5) But when I stipulate for the slave Pamphilus and you promise the slaves Pamphilus and Stichus, I think that the addition of the slave Stichus ought to be considered as surplusage; for if there are as many stipulations as there are subjects, there are at least two here, one a valid stipulation and the other invalid, and the former is not rendered

[3] *Obligatio naturalis* was used to indicate an agreement that could not be enforced directly by action, because no form of action was provided for it. Such agreements could, however, be used as a defence or a set off in an action, or as consideration for a novation, and in other ways, and had therefore considerable importance.

[4] *Gai.* III. 115 *et seq.*

[5] The "Ides" were the fifteenth days of the month in March, May, July, and October, and the thirteenth days in the remaining months.

void by the latter. (6) It makes no difference whether the answer is in the same language as the question or in another. For instance, if anyone has made the demand in Latin, and has been answered in Greek, so long as he is answered suitably, a contract is formed; and it is the same in the contrary case. But whether this applies only to Greek or to some other language, too, such as Carthaginian or Assyrian for instance, or whatever happens to be the language of the second man, may be doubted. In the writings of Sabinus it is very properly admitted, that every tongue suffices for the formation of a contract by express words (*verborum obligatio*), provided however that each party understands the language of the other, either of his own knowledge or by means of an interpreter.

2. *Paulus libro duodecimo ad Sabinum.* Some stipulations consist *in dando* and others *in faciendo*.[6] (1) And of all these some admit of discharge by instalments, as in the case when we stipulate that ten shall be given; others do not, such as those which concern things that are by nature not susceptible to division, as for instance, when we stipulate for such rights-of-way as *via*, *iter*, and *actus*;[7] and others again physically admit of discharge by instalments, but unless given in their entirety do not satisfy the stipulation, as for instance, when I stipulate generally for a slave or a dish, or some kind of vessel; for if a portion of the slave Stichus is paid, no discharge of any part of the stipulation is thereby effected, but he can either be sued for again forthwith or remains due until another slave is given. And this stipulation: "that the slave Stichus or the slave Pamphilus be given?" (*Stichum aut Pamphilum dari?*) is of the same kind. From

[6] The distinction here referred to has no convenient equivalent in English. *In dando* involves the idea of a legal conveyance of property, while *in faciendo* refers to the kind of stipulation which was described as *in factum concepta*. A *factum* could be carried out by anyone, including a slave, and comprised therefore any act a slave could do in performance of a contract. See *Dig.* XLV. i. 38, 6, note *post.*

[7] *Via* is the fullest right-of-way, including the right to transport materials; *iter* and *actus* are restricted rights-of-way. See note to *Dig.* XLV. i. 38, 6, *post.*

stipulations of this kind, therefore, even heirs cannot be discharged by paying their shares, as long as all have not given the very thing itself ; for the nature of an obligation is not changed by the interposition of an heir. And therefore, if the subject of the contract is not susceptible of division, as for instance a right-of-way (*via* [8]), the heirs of the promissor are each liable for the whole ; but in the case where one of the heirs has fully discharged the contract, he will have a right of recovery from his co-heir by means of the proceeding for partitioning an inheritance (*judicium familiae erciscundae*). As a consequence of this, Pomponius says that it may indeed happen that the heirs of a man who had stipulated for a full or modified right-of-way (*via vel iter* [9]) may each have an action for the whole right ; but some think that in such a case the stipulation is extinguished, because the easement cannot be acquired through each of them ; difficulty of discharge, however, does not render a stipulation void. (2) But if, after I have stipulated for a slave, I sue one of the promissor's heirs, something at least of the obligation of the other heirs will survive as long as payment is possible. The same thing applies if a receipt has been given to one of the heirs. (3) What has been said in reference to the heirs applies also to the promissor himself and to his sureties (*fidejussores*).[10] (4) The same also applies when the stipulation is concerned with a *factum*,[11] as for example, if I shall have stipulated in the following words : " that nothing shall be done by you or your heir to obstruct my rights-of-way ? " (*per te non fieri neque per heredem tuum, quo minus mihi ire agere liceat ?*), and one out of several heirs has obstructed the right, all his co-heirs are in fact held liable, but they may claim back from him what they have paid in the proceedings for partitioning the inheritance (*judicium familiae erciscundae*). Both Julian and Pomponius approve this dictum. (5) On the other hand, if a stipulator, who had bargained for the

[8] See note, *Dig.* XLV. i. 38, 6 *post.*
[9] See note, *Dig.* XLV. i. 38, 6 *post.*
[10] See *Gai.* III. 115 *et seq.*
[11] See *Dig.* XLV. i. 38, 6, note *post.*

quiet enjoyment of a right-of-way (*agere licere*) for himself and his heir, has died, and one of his heirs is obstructed, we say that it is important whether the contract is broken as a whole or only as regards the interest in it of the heir who was obstructed. For if a penalty for breach was a term of the stipulation, the contract is broken as a whole, though those heirs whose rights were not obstructed will be met and resisted (in an action) by the defence of fraud (*exceptio doli mali*) ; if however a penalty was not a term of the contract, then a breach is committed only with regard to the heir whose rights were so obstructed.

3. *Ulpianus libro quadragensimo nono ad Sabinum.* The law is the same with regard to the stipulation, "that I may quietly enjoy my rights of ownership and my heir too ?" (*mihi heredique meo habere licere ?*). (1) But this difference [12] is based on the ground that where one of the heirs is interfered with, the co-heirs whose interests are not affected cannot sue on the contract unless a penalty in default of performance be added to its terms ; for when such a penalty is added a breach of the contract affects all parties to it, and no inquiry is made as to whose interest was (adversely) affected. Clearly, where one of the heirs himself causes the interference, all the heirs are liable, for it is in the interest of the person obstructed that no one at all shall infringe his rights under the contract.

4. *Paulus libro duodecimo ad Sabinum.* The same thing applies if I shall have stipulated that you and your heir shall not commit fraud (*dolum abesse a te heredeque tuo*) and either the promissor or the stipulator has died and left several heirs. (1) Cato in the fifteenth book writes, that when a penalty of a certain sum of money has been promised in case any breach of the contract be committed—if on the death of the promissor one out of several heirs has done what was intended to be guarded against, the penalty is either incurred by all the heirs in proportion to their shares in the inheritance, or by one only of them,

[12] That is the difference referred to in the previous paragraph between the case where the contract is broken as a whole, and the case where it is broken only as regards the interest in it of one heir.

in proportion to his own share ; it is incurred by all if the act intended to be provided against is in its nature incapable of division, for instance, " that a right-of-way be established " (*iter fieri*),[13] because whatever cannot be divided into parts is considered in a measure to have been done by all ; but if the act intended to be provided against is susceptible of division, as for instance, " that a right-of-way be not further extended " (*amplius non agi*),[13] then the penalty is incurred by that heir who broke the contract in proportion to his own share in the inheritance only. This is the reason of the difference, that in the former case all are considered to have broken that stipulation, " that nothing shall be done by you to obstruct my rights-of-way " (*per te non fieri quo minus mihi ire agere liceat*), [13] because it can only be broken as a whole. But let us see whether this be not the same, or even a stronger case, than in that stipulation, " Titius and his heir shall ratify " (*Titium heredemque ejus ratum habiturum*) ; for on that stipulation he only is liable who has not approved, and he only has a cause of action by whom approval was sought ; and this opinion seemed right to Marcellus, although the proprietor himself cannot give approval as regards a part. (2) If a man who has stipulated for double price has died and left several heirs, each of them will have an action in proportion to his own share (in the inheritance) for the recovery of his part. It is the same also in a stipulation for mesne profits (*stipulatio fructuaria* [14]), or for threatened damage (*damnum infectum*), or for one arising from a declaration of new works (*ex operis novi nuntiatione* [15]) ; the work, however, referred to in a stipulation arising from a declaration of new works (*nuntiatio operis novi*) cannot be partially reinstated. These matters have been received

[13] See *Dig.* XLV. i. 2, 1 *ante*, and XLV. i. 38, 6 *post*.

[14] This stipulation was used in cases where two parties claimed the same thing and possession was given to one pending decision of the claim. The stipulation was security given by the man in possession for twice the value of the mesne profits in case the other man won the action.

[15] The declaration here referred to was issued by the praetor to prevent the threatened alteration of a building ; its effect was not unsimilar to that of an injunction in English law.

as law on the behalf of stipulators for the sake of expediency; but neither partial reinstatement nor partial maintenance of a right can affect the promissor himself.

5. *Pomponius libro vicensimo sexto ad Sabinum.* Some stipulations are *judiciales*,[16] some are *praetoriae*,[16] some contractual (*conventionales*), and some are both *praetoriae* and *judiciales*. The *judiciales* are those that rise out of the mere office of the arbitrator (*judex*), as for example, for giving security against fraud; the *praetoriae* are those that rise out of the mere office of praetor, as for instance, for security against threatened damage (*damnum infectum*). The stipulations *praetoriae* must be understood to include also those ordered by the aediles; for these too arise from magisterial functions. Contractual stipulations are those made by agreement between the parties, and one might almost say that there are as many different kinds of them as there are subjects of contract; for it is owing to the actual contract in words (*verborum obligatio*) that they have their being, and they depend upon the particular business under consideration. Of stipulations that are common to the two first-named classes an example is that to protect the property of a ward (*rem salvam fore pupilli*); for the praetor orders the interests of a ward to be safeguarded, and sometimes the arbitrator (*judex*) also, if that matter cannot be otherwise arranged; so too the stipulation for double price (*stipulatio duplae*) is either imposed by the arbitrator (*judex*) or is included in the edict of an aedile. (1) Now a stipulation is a formula of words by which the man who is asked answers that he will give or do what he was asked. (2) The contract of bail (*satis acceptio*) is a stipulation which binds the promissor in such a manner that sureties (*adpromissores*) also are accepted with him, that is to say, persons who

[16] The first step in a Roman lawsuit was to apply to the praetor for relief, and any stipulations he imposed on one party to secure the other (as for instance, in the case of threatened damage) were called *stipulationes praetoriae*. If there was a decision to be come to on facts, the praetor appointed an arbitrator (*judex*) in a formula which defined the scope of the reference, and stipulations ordered by the *judex* were called *stipulationes judiciales*.

promise the same thing. (3) It is said that the contract of bail (*satis acceptio*) is effected in the same manner as payment (*satis facere*); for when what any man would be contented with is paid him, payment (*satis facere*) is said to take place; and similarly when such sureties as any man would have accepted are given, so as to be under a contract in express words (*obligatio verborum*), there is said to be a contract of bail (*satis acceptio*). (3*a*) If you promise the principal sum, and if it be not paid, a penalty, even if one of your heirs has paid his own share of the principal, he is nevertheless liable on the penalty until his co-heir's portion of the principal be paid. (4) The same thing applies where a penalty is imposed to enforce agreement to an arbitrator's award, and one heir has obeyed it and the other has not; but the one who obeyed the award ought to be indemnified by his co-heir. For in such stipulations any other result would work a hardship upon the stipulator.

6. *Ulpianus libro primo ad Sabinum.* When a bankrupt's property is under the control of a receiver he continues to acquire for himself by stipulation, but he cannot give a good title by surrender (*traditio*), nor is he liable upon his contracts; and therefore a surety (*fidejussor*[17]) cannot be bound on his behalf, any more than one can be bound on behalf of a madman.

7. *Idem libro sexto ad Sabinum.* A condition, when framed for performance of something impossible, renders a stipulation void; but it is otherwise if such a condition is inserted in a stipulation as, "if I do not ascend to the heavens" (*si in caelum non ascenderit*); for that condition is valid and binding, and suffices to enforce payment of a loan.

8. *Paulus libro secundo ad Sabinum.* In reference to the following stipulation: "if you do not give the slave Stichus on the first of the month (*kalendae*) do you undertake to give ten?" (*si kalendis Stichum non dederis, decem dare spondes?*) there is a question, if the slave has died, whether an action can be brought immediately before the first of the month. Sabinus and Proculus think the

[17] See *Gai.* III. 115 *et seq. ante.*

plaintiff must wait until the day for payment arrives, and this is the better opinion; for the whole contract comprises both a condition and a limit of time, and although the condition seems to have been broken, the limit of time is not yet expired. But where a man promises as follows: "if before the first of next month I do not touch the sky with my finger" (*si intra kalendas digito caelum non tetigerit*), an action lies immediately. Marcellus too is of this opinion.

9. *Pomponius libro secundo ad Sabinum.* If Titius and Seius had both separately stipulated as follows: "if you have not conveyed that farm to him, do you undertake to convey it to me?" (*fundum illum, si illi non dederis, mihi dare spondes?*) the conveyance to the one is subject to the question being first determined whether there has been a gift to the other, and meantime rights of action are in the occupier.

10. *Idem libro tertio ad Sabinum.* We apply this law in such a manner that upon the stipulation: "if Lucius Titius had not come into Italy before the first of May, do you undertake to give ten?" (*si Lucius Titius ante kalendas Maias in Italiam non venerit, decem dare spondes?*) no action can be brought until it has been proved that Titius could not come and did not come into Italy before that date, either alive or dead.

11. *Paulus libro secundo ad Sabinum.* If a son (subject to his father's *potestas*) makes a stipulation while in the enjoyment of full rights of citizenship, he is held to have acquired whatever is due under it on behalf of his father, if the latter returns from captivity amongst the enemy.[18]

[18] If a man in the enjoyment of full rights of Roman citizenship was taken prisoner by the enemy his legal or civic personality was regarded as extinguished, or at any rate, suspended; he suffered what was known as a *deminutio capitis*—a loss of status (as to which see *Gai.* III. 101, note *ante*). As a consequence, his son, before then subject to his *potestas* or jurisdiction, took his place, and became *sui juris*. If the father returned from his captivity, his suspended civic personality was resumed, and he then reacquired his jurisdiction over his son, and with it the right to whatever his son had acquired by stipulation.

12. *Pomponius libro quinto ad Sabinum.* If I shall have made a stipulation in the following terms : " Do you undertake that ten or five shall be given ? " (*Decem aut quinque dari spondes ?*) payment of five is due ; and if in this form : " Do you undertake it shall be given on the first of January or the first of February ? " (*Kalendis Januariis vel Februariis dari spondes ?*) it is the same in effect as if I had stipulated the payment on the " first of February " (*kalendis Februariis*).

13. *Ulpianus libro nono decimo ad Sabinum.* He who stipulates " before the first of next month " (*ante kalendas proximas*) brings about the same result as the man who simply stipulates " on the first " (*kalendis*).

14. *Pomponius libro quinto ad Sabinum.* If I had stipulated with you that " a house be built " (*domum aedificari*), or if I had condemned my heir to build a tenement house (*insula*), Celsus is of opinion that in such a case no action can be brought until sufficient time has elapsed within which it was possible for a tenement house to have been built ; nor will sureties (*fidejussores*[19]), if any have been given, be liable at any earlier time.

15. *Idem libro vicensimo septimo ad Sabinum.* . . . And so there is a doubt whether, if some portion of the tenement house has been completed and then is destroyed by fire, the whole time required to construct it ought to be reckoned over again, or whether only the unexpired portion of the estimated time ought to be allowed. The better opinion is that the promissor ought to be allowed the full time for completion.

16. *Idem libro sexto ad Sabinum.* If you owe me either Stichus or Pamphilus, and one or other of them becomes mine on other grounds, the one that is left is due to me from you. (1) A stipulation of this kind " in each year " (*in annos singulos*) is one that is both indefinite and perpetual, and is not, like a bequest of that kind, terminated by the death of the legatee.

17. *Ulpianus libro vicensimo octavo ad Sabinum.* A stipulation is not enforceable which contains a condition dependent on the free-will of the promissor.

[19] See *Gai.* III. 115 *et seq. ante.*

18. *Pomponius libro decimo ad Sabinum.* He who has promised the same thing twice over incurs no greater legal liability than if he had promised it once only.

19. *Idem libro quinto decimo ad Sabinum.* If a stipulation has been made to this effect: "if a divorce has taken place by reason of your fault, do you undertake to give?" (*si culpa tua divortium factum fuerat, dari?*) no contract is made, because we ought to be satisfied with the penalties imposed by law; save in the case however, where the stipulation imposes a penalty of the same amount as that provided by law.

20. *Ulpianus libro trigesimo quarto ad Sabinum.* Stipulations of this kind are not void: "Do you undertake to give what Titius owes you, when he has ceased to be your debtor?" (*Quod tibi Titius debet, cum debitor esse desierit, dare spondes?*), for the stipulation is binding, as it would be if framed under any other condition whatever.

21. *Pomponius libro quinto decimo ad Sabinum.* If, after divorce, a woman who had no dowry stipulates that 100 be paid her as and for her dowry, or a woman who had only 100 as dowry stipulates that 200 be given back as and for her dowry: Proculus says, that if she who had 100 as a dowry stipulates for the return of 200 there is no doubt that 100 at least passes under the contract, while the other 100 is recoverable by an action for dowry (*actio de dote*). And it must be held, therefore, that even if she had no dowry the stipulation is valid for 100, just as a legacy bequeathed under the name of dowry to a daughter, or a mother, or a sister, or any other woman, is a good and valid legacy.

22. *Paulus libro nono ad Sabinum.* If I have stipulated with you for something I thought to be made of gold, but which was in fact made of brass, you will be liable to me for it in brass, since we were in agreement as to the article itself; but I shall have a right of action against you for fraud if you intentionally deceived me.

23. *Pomponius libro nono ad Sabinum.* If you owe me a particular slave, either under a legacy or in consequence of a stipulation, you are only liable to me after his death if it was through some fault of your own that you did not

make him over to me while he was alive ; and this would be the case if you either refused to hand him over upon request or killed him.

24. *Paulus libro nono ad Sabinum.* But if a ward is bound by stipulation to make over the slave Stichus, it does not seem that delay made by him is such as will make him liable on the death of Stichus, unless he acted with his tutor's authorisation (*auctoritas*), or the tutor alone was requested to deliver him.

25. *Pomponius libro vicesimo ad Sabinum.* If I stipulate for something which is already owing to me on a stipulation in reference to which the promissor has a good defence (*exceptio*), he will be bound by the later stipulation, since the earlier one is, as it were, of no effect, because a good defence to it is available.

26. *Ulpianus libro quodragesimo secundo ad Sabinum.* It is well known that stipulations that are immoral have no binding force.

27. *Pomponius libro vicensimo secundo ad Sabinum. . . .* As, for instance, if anyone promised to commit murder or sacrilege. And it is also within the scope of a praetor's authority to refuse an action upon this sort of contract. (1) If I shall have stipulated as follows : " if within two years you do not climb the Capitol, there shall be given ? " (*si intra biennium Capitolium non ascenderis, dari ?*) I cannot properly claim to recover for a breach unless two years have passed by.

28. *Paulus libro decimo ad Sabinum.* If we stipulate for something to be handed over (*tradi*), we are not understood to have contracted that ownership (*proprietas*) in it be passed to the stipulator, but simply that physical custody of it (*traditio* [20]) be given.

29. *Ulpianus libro quadragensimo sexto ad Sabinum.* It ought to be pointed out that in stipulations there are as many contracts as there are sums of money, or kinds of goods. Consequently it happens, that when a sum of money, or an article of merchandise, which was not in the

[20] *Traditio* was a *res facta*, and had the effect of giving custody, and in that sense possession, but did not pass a right (*jus*) of ownership. See, as to *res facta*, *Dig.* XLV. i. 38, 6, note *post.*

preceding stipulation is added, novation does not take place, but the effect is that two contracts are made. Although the opinion prevails that there are as many contracts as there are sums of money, or articles of merchandise, yet if anyone stipulates for money which is within his sight, or for a pile of coins, there are not as many stipulations as there are individual coins, but one stipulation only ; for it would be absurd to have a separate stipulation for every single penny (*denarius*). It is clear too, that a stipulation for legacies is only one stipulation, although a legacy may include many articles, and there may be several legacies. And a stipulation for the household effects (*familia*), or for all a man's slaves, is likewise one contract. And so also a contract for a four-horse team (*quadrigae*), or for litter-bearers (*lecticarii*) is one stipulation. But if anyone stipulates for this article and that, there are as many contracts as there are articles referred to. (1) If I stipulate for a slave from a thief, it is questioned whether the stipulation is valid. The question arises because in many cases I may appear to be stipulating for my own slave ; and a stipulation of this kind, that is to say, where anyone stipulates for his own property, is not binding. And it is agreed, if I stipulate as follows : " what you ought to give or render to me by reason of my claim for restitution ? " (*quod ex causa condictionis dare facere oportet ?*) the stipulation is valid ; if however, I shall have stipulated that a slave be given, the stipulation has no force. But if afterwards the slave is declared to have died, without any negligence, Marcellus says the thief is not liable under the claim for restitution (*condictio*) ; for as long as the slave lived he could be formally claimed, but if he is declared to have died the circumstances are such that the claim for restitution arising out of the stipulation disappears altogether.

30. *Idem libro quadragesimo septimo ad Sabinum.* It ought to be generally known that if anyone has himself written down that he will be surety (*fidejussor* [21]) all the technicalities are considered to be complied with.

31. *Pomponius libro vicesimo quarto ad Sabinum.* If I

[21] See *Gai.* III. 115 *et seq. ante.*

stipulate for my own property conditionally (*sub condicione*) the stipulation is binding if the property in question has ceased to be mine at the time when the condition becomes operative.

32. *Ulpianus libro quadragensimo septimo ad Sabinum.* If there be an error in the name of the slave whom we stipulate should be given to us, but agreement as to his personality prevails, the contract is binding.

33. *Pomponius libro vicensimo quinto ad Sabinum.* If Stichus the slave was promised on a specific date, and has died before the day arrives, the promissor is not liable.

34. *Ulpianus libro quadragensimo octavo ad Sabinum.* It makes a great difference whether I stipulate for something over which I do not exercise *commercium*,[22] or whether someone else promise a thing over which he does not exercise that right; for if I stipulate for property of that kind it would seem that the contract is void; but if a man promises me something over which he has no *commercium* he injures himself, and not me.

35. *Paulus libro duodecimo ad Sabinum.* If I make a stipulation that something shall be done that nature will not permit there is no contract, any more than there would be if I stipulated for the gift of something which could not be given: unless it was due to someone else's intervention that the obligation could not be carried out. (1) So too the obligation is void if it extends to something prohibited by law, provided that the prohibition is a continuing one, as for instance, if a man stipulates that his sister should be married to him; and even if the prohibition be not continuing, as happens in the case of an adopted sister,[23] the same ruling applies, because such a practice is firmly opposed to good morals. (2) In the cases of letting on hire, selling, or buying, anyone who has not answered the formal question, but has assented to what was answered, is bound, because contracts of this kind depend not so much upon formal words (*verbis*) as upon assent (*consensu*).

[22] *Commercium* is the right to deal with property in strict legal form.

[23] *I.e.* after she is freed from the adoption.

36. *Ulpianus libro quadragensimo octavo ad Sabinum.* If anyone, after he has agreed to be bound in one way, is bound in another way by trickery, he will be held liable in strict law but he can make use of the defence of fraud (*exceptio doli mali*) in pleading to an action; for because he was under an obligation as a result of a fraud the *exceptio doli* is open to him. It is just the same if there be no actual fraud on the part of the stipulator, but the act required is in its nature fraudulent; for when anyone brings an action upon such a stipulation he takes advantage of the fraud in suing.

37. *Paulus libro duodecimo ad Sabinum.* If I have stipulated for particular coins—suppose, for example, those which are contained in a chest—and they happen to have been destroyed without any negligence attributable to the promissor, nothing is owed upon the contract.

38. *Ulpianus libro quadragensimo nono ad Sabinum.* The stipulation *habere licere spondes?* [24] means that the stipulator shall be permitted to quietly enjoy rights of ownership, and that nothing shall be done by anyone at all to obstruct such rights. The effect of this is that the promissor appears to have guaranteed that you shall have quiet enjoyment in the future; he seems therefore to have contracted with regard to the acts of third parties, but nobody is bound by guaranteeing the conduct of others; and this law applies. But he does bind himself not to disturb the stipulator's quiet enjoyment; and he is also held to contract that neither his family heir (*heres suus* [25]), nor any of his other successors, shall interfere with the stipulator's rights of ownership. (1) But if anyone promises that nothing shall be done by a third party, it must be understood that, save as regards the acts of his family heir (*heres suus*) such a promise, extending to the acts of third parties, is void. (2) Though if anyone desires to promise as to the acts of third parties he can do so by promising as a penalty the value of the property concerned if the acts be done. But to what extent will

[24] The equivalent to a covenant for quiet enjoyment in English law.

[25] See *Gai.* Bk. II. 152 *et seq.*

he be considered to allow quiet enjoyment if nobody infringes the right?—that is to say, neither the promissor himself, nor his heir, nor his heir's successors. (3) If anyone happens to have raised a dispute, not concerning the proprietary rights (*proprietas*), but in reference to the bare right to possession, or the usufruct (*usufructus*), or the use and enjoyment (*usus*), or if any other of the stipulator's rights is infringed, the stipulation is clearly broken; for he whose right over what he owns is in the least degree impaired, cannot be said to quietly enjoy. (4) It has been questioned whether it is possible to promise quiet enjoyment (*habere licere*) with regard to one's own property only, or with reference to other people's property as well. The better opinion is that such a promise can be made with reference to the property of others; and such a promise takes effect when the subject of the contract has come to be owned by the promissor. Though if the subject of the contract continues to remain the property of the third party, the stipulation will not be said to be broken, unless a penalty for its breach has been added, since nothing has in fact been done by the promissor or his successors. (5) Just as, on the part of the promissor, his successors are bound as well, so too on behalf of the stipulator the stipulation is broken as regards the stipulator himself, and all others his successors, if, of course, he is not permitted quiet enjoyment. If on the other hand, the quiet enjoyment of third parties [26] be interfered with, there is clearly no action on the stipulation, and it does not matter whether my contract was "for quiet enjoyment" (*habere licere*) or "for my own quiet enjoyment" (*mihi habere licere*). (6) Those who are subjected to the jurisdiction (*potestas*) of others can acquire rights of quiet enjoyment for those under whose jurisdiction they are by stipulation for the same reason as they can acquire other things for them by stipulation. But if a slave has stipulated for his own quiet enjoyment, it is a question whether such a stipulation is valid. Julian, in the Fifty-Second Book of his Digest, says that if a slave stipulates that he should quietly enjoy (*sibi habere licere*), or promises that nothing shall be done

[26] *I.e.* parties other than the stipulator and his successors.

by him to hinder the stipulator's quiet enjoyment (*per se non fieri, quominus habere stipulatori liceat*) the stipulation (he says) takes no effect, even if the property in question be taken away from the slave, or if the slave himself takes it away from the stipulator; for in this stipulation not a *factum*,[27] but a *jus*, is involved.[28] When, however, he (the slave) stipulates that nothing shall be done by the promissor to obstruct his rights-of-way (*per promissorem non fieri, quominus sibi ire agere*[29] *liceat*), the stipulation, he says, turns not upon a *jus* put upon a *factum*.[30] But it appears to me that although a stipulation for quiet enjoyment (*habere licere*) contains words importing a *jus*[31] (*verba*

[27] The words *jus* and *factum*, as here used, must not be confused with "law" and "fact," as used in the English legal system. *Jus* in Roman law is used in contrast to *factum* to indicate rights that were exercisable only by Roman citizens of full age and capacity; *factum*, on the other hand, indicates all rights that were exercisable, not only by Roman citizens of full age and capacity, but also by the various classes of persons who, amongst the Romans, had a limited jural personality—children subject to the *patria potestas*, women subject to *manus*, freedmen of one kind and another, and in particular slaves. The reason for this distinction has been traced to the institution of *infamia*, which amounted to permanent loss of civic personality (the right to vote, and the right to hold any public office), and was, therefore, much dreaded. *Infamia* resulted from, amongst other things, defeat in an action at law, that is to say an action under the strict system of the *jus civile*; and these actions ultimately became known as actions *in jus concepta*; the action *in factum concepta* depended on the *jus honorarium*, which emanated entirely from the praetor, and defeat in such an action did not bring about *infamia*. This twofold destinction in kinds of rights grew up, therefore, with the praetor's assistance, as an outcome of the continual effort made to avoid the risk of incurring *infamia*. See *Graeco-Roman Institutions*, by Emil Reich.

[28] The stipulation *sibi habere licere* was a contract for a *jus*, and therefore could not be made by a slave so as to be enforceable.

[29] *Ire* or *iter* is a simple right-of-way for a man, walking. *Agere* or *actus* is a right to walk and drive beasts over another's land, and therefore includes *iter*. The fullest right-of-way, including driving cattle or vehicles, and walking, and the transport of materials, is described as *via*.

[30] And therefore a slave could maintain an action on it.

[31] That is the word *habere* which has a technical signification, meaning possession of property in a sense of absolute ownership.

juris), yet it ought to be admitted that in the case of a slave or a son subjected to the paternal jurisdiction (*filius familiae*) the action is in reference to the question of retaining possession (*possessio* [32]) and not to taking it away, and that consequently the stipulation should be binding (when made by a slave). (7) This stipulation, too : " Do you undertake to let me have possession ? " (*Possidere mihi licere spondes?*) is a binding one ; but let us see whether a slave can validly make such a stipulation on his own behalf. Although a slave, according to the civil law, does not possess anything, yet this contract is intended to refer to occupation (*possessio naturalis*), and therefore there ought to be no doubt that a slave in that form makes a contract that is enforceable. (8) Clearly if a slave has stipulated to be allowed to keep anything (*tenere* [33] *sibi licere*) it is agreed that the stipulation is binding ; for although according to civil law slaves cannot possess anything, yet no one doubts that they can have the actual custody of goods. (9) The word *habere* has a twofold signification ; for we apply it to describe the right of the actual owner (*dominus*) of anything, and also the right of the man who is not the owner, but merely keeps property ; in consequence of this we are accustomed to use the word *habere* with regard to property which is merely deposited with us for custody. (10) If anyone has stipulated that he should have the usufruct of anything for himself (*uti frui sibi licere*) the benefit of the contract does not pass to his heir. (11) And even if the words " for himself " (*sibi*) be omitted, I do not think a stipulation for usufruct benefits the heir, and this is the law in use. (12) But if anyone stipulates for a right of usufruct for himself and his family heir (*uti frui sibi heredique suo*) let us consider whether the heir can bring an action to enforce the contract. And in my opinion he can do so, although the right of enjoyment has been shared ; for if anyone

[32] *Possessio*, however, may mean merely occupation, and is then a *factum*.

[33] *Tenere* means having or possessing in the sense of having control over, having in one's power, or retaining, and is therefore a *factum*, and not a *jus*.

stipulates for a right-of-way for himself and his family heir (*ire agere sibi heredique suo licere*) we approve the right of action. (13) If anyone wishes to guard himself against fraud (*dolus malus*) by the promissor and his heir it is sufficient to stipulate that "it be absent and remain absent" (*abesse afuturumque esse*); but if he desires to be protected against the fraud of more persons it is necessary that these words be added: "Do you undertake that the value of that property shall be given, if there is any fraud in reference to it now, or in the future?" (*Cni rei dolus malus non abest, non afuerit, quanti ea res erit, tantam pecuniam dari spondes?*). (14) Any man may associate his heir with himself in a contract. (15) And an adopted father (*pater adoptivus*) may in fact also be joined. (16) There seems also to be a distinction between a day unspecified and a fixed day, arising from the fact that what was promised for a fixed day (*dies certa*) can be paid at once; for the whole intervening period is open to the promissor in which to pay; but he who promised, "if a certain thing be done" (*si aliquid factum sit*), or, "when something is done" (*cum aliquid factum sit*), is not considered to have fulfilled his promise, unless he has performed it when that event happened. (17) No one can stipulate on behalf of another, with the exception that a slave may stipulate on behalf of his owner, or a son (subject to the *potestas*) on behalf of his father; for contracts of this kind were brought into use so that each should acquire for himself for his own interest; and that another may profit is not to my interest. If I wish to do this a suitable form is clearly to stipulate for a penalty (*poena*), so that if the matter be not carried out as agreed the stipulation may be broken, even as regards a stipulator who has no direct interest in the performance of the agreement; for when anyone stipulates for a penalty on breach of the agreement, we are not concerned with who benefits from the performance, but only with the amount of the penalty and the condition which makes it payable. (18) When a question arises in reference to a stipulation as to what was agreed the words are construed most strongly against the stipulator. (19) He

(for instance) who stipulates : " ten to me and ten to Titius " (*mihi decem et Titio decem*) must be thought to refer to the same ten and not to another lot of ten. (20) If I stipulate for another person when it was to my own advantage, let us see whether the stipulation is actionable. Marcellus says the contract is binding in a case of this sort. A man who has actually commenced to carry out the duties of guardian to a ward, has resigned and has stipulated with his fellow guardian for the safeguarding of the ward's estate. Marcellus says this stipulation can be upheld as binding ; for it is to the stipulator's interest that what he asked be carried out, since he might have been made personally liable to the ward if he had resigned his guardianship without this precaution. (21) If anyone has promised or contracted to construct a tenement house and afterwards has agreed with another man that he should build it for the stipulator ; or if anyone, when he has promised to give Titius a farm belonging to Maevius, or to pay him damages (*poena*), if he does not do so, has stipulated with Maevius that the farm shall be given to Titius as a gift ; or if a man has sublet work which he contracted to carry out, it is agreed that he would have an action (*actio utilis* [34]) based upon the action appropriate to the contract of hiring (*ex locato*). (22) If therefore anyone has stipulated when it was to his own interest, that something should be given to some other man, the position is that the stipulation is binding and enforceable. (23) Hence also if I stipulate for something to be given to my agent (*procurator*) the contract is binding ; so too if I stipulate for something to be paid to my creditor, because it is to my interest that neither a penalty be incurred nor the property that was given as a security be alienated. (24) If anyone has agreed by stipulation

[34] An *actio utilis* was an action granted by the praetor in cases where the strict formula did not quite apply, but where the facts were almost analogous. It was one of the methods by which the old *legis actio* was extended and made more comprehensive by the equitable jurisdiction of the praetor. This is almost equivalent to the old action on the case in English law.

to produce a man in court (*illum sistas*) there is no reason why an obligation should not thereby arise. (25) We can stipulate for a temple to be built or for ground to be consecrated (*locum religiosum*); and in no other way can we have (on a stipulation) an action arising from the contract of hiring (*ex locato*).

39. *Paulus libro duodecimo ad Sabinum.* A master acquires property as a result of a stipulation made by his slave; and a father also acquires property as a result of his son's [35] stipulations, so far as the law allows.

40. *Pomponius libro vicensimo septimo ad Sabinum.* If my son stipulates through the agency of my slave, whatever is acquired is mine.

41. *Ulpianus libro quinquagensimo ad Sabinum.* It is clear that he who stipulates for "the kalends [36] of January" (*kalendis Januariis*), if he adds the "first" or "next" kalends (*primis vel proximis*), leaves no doubt as to which he refers to; so too, if he speaks of the "second," or "third," or some other January, he is equally unambiguous. But if he does not specify which January we must make an assumption to decide what he really did intend, that is to say, what the agreement was between the parties (for we must clearly adhere to what the parties agreed upon). But if the date does not appear it ought to be assumed, as Sabinus says, that the kalends of next January were intended. But what assumption ought we to make if a man puts forward his stipulation on the very day of the kalends itself? I think he must be taken to intend the kalends of the next ensuing January. (1) For when the date is not named in a contract the money is due on the present day, except that when a place for payment has been specified a sufficient amount of time must be inferred to allow for reaching the place of payment. In fact, if a specified day for payment is added, the money is not due on the present day (*i.e.* at once); so it seems that naming a day for payment benefits the debtor and not the creditor. (2) The same

[35] If the son be subject to his father's jurisdiction.
[36] The first day of the month.

thing applies of course to the Ides [37] and the Nones,[38] and generally to all dates.

42. *Pomponius libro vicensimo septimo ad Sabinum.* Whoever has stipulated for performance, "this year" (*hoc anno*), or "this month" (*hoc mense*), cannot, properly speaking, bring an action till the whole of the year or month be passed.

43. *Ulpianus libro quinquagensimo ad Sabinum.* If anyone has stipulated for restitution on the arbitration, say of Lucius Titius, and then himself has prevented Titius from deciding, the promissor is not liable as if he had caused the delay. And if he who ought to decide himself caused the delay? The better opinion is that the matter ought not to be withdrawn from the arbitrator appointed.

44. *Paulus libro duodecimo ad Sabinum.* Hence, if the matter be not decided at all, the stipulation is of no use, so that even if a penalty for a breach of it be added, not even the penalty is due.

45. *Ulpianus libro quinquagensimo ad Sabinum.* Whatever he who is subjected to another's jurisdiction (*potestas*) stipulates for is acquired for that other in the same manner as it would have been acquired had he himself made the stipulation. (1) Even those who are subjected to another person's jurisdiction (*potestas*) can stipulate for when they shall die (*cum morientur*), just as any other person can stipulate for when he shall die (*cum morietur*). (2) If any man stipulates: "Do you undertake for conveyance to my daughter after my death?" (*Post mortem meam filiae meae dari?*) or: "Do you undertake for conveyance to me after my daughter's death?" (*Post mortem filiae meae mihi dari?*) his contract is a binding one; and in the first case his daughter will have a cause of action (*actio utilis* [39]) although she is not his heir. (3) Not only can we

[37] The Ides were on the fifteenth day of the month in March, May, July, and October, and on the thirteenth day of the remaining months.

[38] The Nones were the ninth day before the Ides, both days included, that is to say, the seventh days of March, May, July, and October, and the fifth days of the remaining months.

[39] See *Dig.* XLV. i. 38, 21, note *ante*.

stipulate for "when you die" (*cum morieris*), but also for "if you die" (*si morieris*); for just as there is no difference between the phrases "when you come" (*cum veneris*) and "if you come" (*si veneris*), so there is none between the phrases "if you die" and "when you die." (4) A son subject to his father's jurisdiction is considered to stipulate on his father's behalf even if this be not added.

46. *Paulus libro duodecimo ad Sabinum.* We may validly stipulate for "conveyance on the hundredth kalends hence" (*centesimis kalendis dari*) because the obligation is a present one, but payment is postponed to a certain day. (1) But an obligation which consists of doing something cannot be referred to the time of death; for instance: "when you die, do you undertake to come to Alexandria?" (*cum morieris, Alexandriam venire spondes?*). (2) If I shall have stipulated for payment "when you wish" (*cum volueris*), some say the contract is void, and others that it is void if you die before expressing your wish, which is indeed true. (3) And it is agreed on all sides that the stipulation, "Do you undertake to convey if you wish to?" (*si volueris, dari?*) is void.

47. *Ulpianus libro quinquagensimo ad Sabinum.* Whoever stipulates: "Do you undertake to pay me what you ought to give me on those kalends?" (*quod te mihi illis kalendis dare oportet, id dare spondes?*) is not considered to stipulate for to-day, but for the day of his choice, that is to say, the kalends referred to.

48. *Ulpianus libro vicensimo sexto ad edictum.* If I shall have stipulated that ten be given "when I ask for them" (*cum petiero*) the stipulation is more of the nature of a warning to ensure that payment should be quicker, and so to speak, without any delay, rather than a condition; and, therefore, although I die before I make a request for payment, the agreement is not considered to have failed.

49. *Paulus libro trigensimo septimo ad edictum.* When a son subjected to his father's jurisdiction (*filius familias*) has undertaken that the slave Stichus shall be given, and it was his fault that he was not given, and Stichus

has died, there will be an action (*actio de peculio* [40]) against the father to the extent of the son's liability under the contract. But if the father caused the delay the son is not held liable, but there will be a right of action (*actio utilis*) [41] against the father. The same thing also applies with regard to the sureties (*fidejussores* [42]). (1) If I shall have stipulated that "nothing shall be done through you to obstruct my rights of way" (*per te non fieri, quominus mihi ire agere liceat* [43]), and shall have taken a surety (*fidejussor* [44]) for due performance of the contract; if the surety (*fidejussor*) commits a breach of the contract neither he nor the promissor is liable, but if the promissor breaks it both of them are liable. (2) In the following stipulation: "nothing shall be done by you or your heir" (*neque per te neque per heredem tuum fieri*), the contract is considered to have been broken by the heir, although he was absent and knew nothing about it, and therefore did not do what ought to have been done under the contract. But in a stipulation of this kind, if the heir be a ward (*pupillus*) a breach is not considered attributable to him. (3) If a man who promised a slave had payment demanded from him before the date for which the slave was promised, and the slave had died, he was not held to be liable.

50. *Ulpianus libro quinquagensimo primo ad edictum.* In that stipulation: "that nothing shall be done by you" (*per te non fieri*), the meaning is not that you will not do anything to disable yourself from carrying out your promise, but that you will take care that you may be able to carry it out. (1) So too in a stipulation concerning the sale of an inheritance for: "the balance of monies which but for your fraud now or in the future would have come to you" (*quanta pecunia ad te pervenerit dolove malo tuo*

[40] That is an action in which the amount of damages recoverable is limited to the amount of the son's *peculium* (his private earnings). The father therefore who is sued pays out of, and only to the extent of, the son's earnings.

[41] See *Dig.* XLV. i. 38, 21, note *ante*.

[42] See *Gai.* III. 115 *et seq. ante*.

[43] See *Dig.* XLV. i. 38, 6, note *ante*.

[44] See *Gai.* III. 115 *et seq. ante*.

factum est eritve, quo minus perveniat), no one can doubt that the man who so acts that nothing comes to him at all is liable.

51. *Idem libro quinquagensimo primo ad edictum.* He who has promised another man's slave is not liable in an action on the contract after the slave has been released; for it suffices that he should have acted without fraud or negligence.

52. *Idem libro septimo disputationum.* In ordinary business stipulations (*stipulationes conventionales*) the parties themselves determine the form of the agreement. Stipulations given by the praetors (*stipulationes praetoriae*) are however composed by the praetor who issues them; moreover, the stipulations given by the praetors cannot be changed at all, either by adding something or by omitting a part. (1) If anyone has promised that vacant possession [45] shall be handed over, this stipulation includes not only the bare fact of possession, but also a full right to the property.

53. *Julianus libro sexto decimo digestorum.* The most convenient way of framing stipulations is to draw them so as to specify whatever can be expressly included, but the clause as to fraud (*clausula doli*) applies to matters which cannot occur at the present time and to events uncertain.

54. *Idem libro vicensimo secundo digestorum. Species* are referred to in some stipulations, *genera* in others. When our stipulation concerns *species* the benefit of it must necessarily be divided between stipulators and between heirs, so that parts are due to each. But whenever we stipulate for *genera* the division between them is a numerical one; for instance, when a man has stipulated for the slaves Stichus and Pamphilus, and has left his property in equal parts to two heirs, a half part of Stichus and a half part of Pamphilus must be owed to each of them; but if the same man stipulated simply for two slaves, one slave is owed to each of his heirs. (1) A

[45] *Possessio* sometimes used to indicate a right (*jus*), and sometimes a fact (*factum*). See *Dig.* XLV. i. 38, 6 *et seq.*

stipulation for work and labour (*stipulatio operarum* [46]) is the same in this respect as these stipulations in which *genera* are referred to; and consequently the division of such a stipulation is not into different parts of the work, but with regard to its amount. If a slave (*servus* [47]) owned jointly has stipulated for one work, each master (*dominus* [47]) must claim the benefit of a part of the work proportionate to the share he has in the slave. Payment of an obligation of this kind is most readily arranged if the freedman (*libertus* [47]) chooses to offer the value of the work (in lieu of it) or if his patrons (*patroni*) [47] consent to the benefit of the work being enjoyed in common.

55. *Idem libro trigensimo sexto digestorum.* When anyone has stipulated that something be given to himself or to Titius, payment to Titius only, and not to his successors as well, is a good discharge.

56. *Idem libro quinquagensimo secundo digestorum.* The man who stipulates thus: "Do you undertake to give ten to Titius and myself?" (*Mihi et Titio decem dare spondes?*) is, in fact, always more likely to stipulate for one ten, jointly for himself and Titius, just as he who gives a legacy to Titius and Sempronius is only understood to bequeath one ten for the two of them jointly. (1) "Do you and your heir Titius undertake that ten shall be given?" (*Te et Titium heredem tuum decem daturum spondes?*). The addition of Titius in this case is regarded as superfluous; for he will either be liable for the whole, if he survives as sole heir, or else his obligations will be for his proportionate share only in the same manner as all his co-heirs are liable. And although it may seem that the agreement

[46] When a slave was liberated voluntarily by his master he was obliged to serve him to some extent, and the nature and extent of these services was generally defined by the stipulation here referred to, the *stipulatio operarum*.

[47] After liberation the slave became *libertus* and the master *patronus*, and in this paragraph the parties are first described as *servus* and *dominus* and later as *libertus* and *patronus*, perhaps because it was customary to make the slave promise the amount and nature of the *operae*, to be ordered after his release, before he was actually liberated, and therefore before he became *libertus*.

is that no claim shall be made on any other heir than Titius, yet the defence of concluded agreement (*exceptio pacti conventi* [48]) will be of no avail to his co-heirs. (2) He who stipulates that something should be given to himself or his son[49] clearly includes his son so that payment may be rightly made to him ; and it makes no difference whether a man stipulates for payment to himself or any stranger you like, or to himself or his son ; and therefore, whether the son remains subject to the paternal jurisdiction (*potestas*) or is freed from it, payment is rightly made to him. And it does not matter what the man who stipulates something be given to his son acquires for himself, because by joining his own name in the contract the stipulator makes it clearly to be understood that he has included his son's name, not for the purpose of acquiring an obligation, but for convenience of payment. (3) But if anyone stipulates that something be given to his son who is subject to his jurisdiction (*potestas*) only, payment is not rightly made to the son, because the son's name is here used for the purpose of making a contract rather than for payment. (4) He who stipulates thus : "Do you undertake that ten shall be given as long as I am alive ?" (*Decem, quoad vivam, dari spondes?*) rightly claims payment forthwith ; but his heir (if he sues) is non-suited by the defence of concluded agreement (*exceptio pacti conventi* [50]) ; for it is clear that the stipulator has framed his contract to prevent his heir suing, just as in the same way he who stipulates that something be given before the first of the month (*kalendae*) can bring an action even after the first, but will be non-suited by this same defence. And the heir of a

[48] See *Dig.* XLV. i. 56, 4, note *post*.

[49] This refers to a son that is subjected to the paternal jurisdiction.

[50] This defence was given on equitable grounds to resist claims which, in strict law, might lie. In cases like the present, where the agreement itself limited the enjoyment of the contract to the stipulator's life, it was clearly fair that if a right of action on the contract passed to the heir and the heir brought an action, a defence should be available on the ground that the agreement itself was that the benefit of the contract should be confined to the stipulator's lifetime.

man to whom an easement over a country estate has been granted, so that for so long as he lives he shall have a right-of-way over it, will be met and defeated by the defence of agreement concluded (*exceptio pacti conventi*). (5) He who stipulates thus : " Do you undertake it shall be given before the first of next month ? " (*Ante kalendas proximas dari spondes ?*) makes the same stipulation as he who asks that it shall " be given before the first of the month " (*kalendis dari*). (6) A man who has proprietary rights (*proprietas*) without the right of usufruct may properly stipulate that usufruct be granted him ; for he contracts for something he has not got, but is capable of having. (7) If, when I have stipulated with you for the Sempronian farm, I subsequently stipulate with someone else for the same farm without the usufruct of it, the first contract is not thereby cancelled, and hence you will not be freed by conveying the farm without the usufruct of it, but I can still sue you for the usufruct of the farm. But when you have conveyed that farm to me, he with whom I contracted for the farm without the usufruct of it is released from his contract. (8) If Seius has promised me under a condition a slave that I have stipulated for from Titius without condition, and the slave has died before the condition was fulfilled and after Titius has delayed in delivery of him, I can immediately sue Titius, and Seius will be under no obligation when the condition is fulfilled ; but if I have given Titius a receipt for the slave, Seius can be made liable when the condition is fulfilled. These two cases differ in this way, for when the slave is dead the subject of Seius' obligation ceases to exist ; but when a formal receipt is given the slave that Seius promised still exists.

57. *Idem libro quinquagensimo tertio digestorum.* If anyone has promised " if Titius is made consul ten shall be given " (*si Titius consul factus erit, decem dari*), and happens to die while the condition is still unfulfilled, he leaves his heir liable on the contract.

58. *Idem libro quinquagensimo quarto digestorum.* He who stipulates for the usufruct of a farm, and afterwards for the farm itself, is like the man who contracts for part

of the farm and subsequently for the whole of it, because a farm is not considered to be conveyed if the usufruct is withheld. And in the contrary case, he who stipulates for a farm, and afterwards for the usufruct of it, is like the man who makes a contract for the whole at first and later on for a part only. But the man who contracts for a right to drive cattle (*actus* [51]), and afterwards for a right to pass without a right of driving (*iter* [51]), effects nothing by the later contract, just as he who stipulates for ten, and subsequently for five, effects nothing in the second case. So too, if anyone stipulates for the produce (*fructus*), and afterwards for the use only (*usus*), his second stipulation has no effect, except if in all cases he has expressly stated that he contracted on the second occasion with the intention of creating a novation of the first contract; for in that event a right of action upon the second contract arises when the first contract comes to an end, and then the right to pass without the right of driving (*iter*), or the right to the use (*usus*), can be sued for; so too can the five.

59. *Idem libro octagensimo octavo digestorum.* Whenever a man has stipulated for oil on a particular day, or on a certain condition, the estimate of its market value ought to be referred to the time when payment was due; for it is then that the cause of action arose; and if it be not so referred there will be some disadvantage to the defendant.

60. *Ulpianus libro vicensimo ad edictum.* The same thing applies if anyone stipulated that a certain measure of oil should be supplied at Capua; for the market price is estimated at the time when action can be brought, and action can be brought on the first day by which the oil could have reached Capua.

61. *Julianus libro secundo ad Urseium Ferocem.* A stipulation framed in this manner: "If you do not make me heir, do you undertake to give so much?" (*Si heredem me non feceris, tantum dare spondes?*) is void, because it is contrary to public morals.

62. *Idem libro secundo ex Minicio.* If a slave has stipu-

[51] See *Dig.* XLV. i. 38, 6, note *ante*.

lated for money from another person against his master's orders, he none the less renders the promissor liable to his master.

63. *Africanus libro sexto quaestionum.* If anyone stipulates in the following way: "whether a ship shall arrive from Asia or Titius shall be made consul" (*sive navis ex Asia venerit sive Titius consul factus fuerit*) whichever condition is first performed, liability on the contract arises, and no fuller liability can ever arise. For when out of two separate conditions one fails, it necessarily happens that the one which operates makes the promissor liable on the stipulation.

64. *Idem libro septimo quaestionum.* A stipulation of this kind is suggested: "If Titius is made consul do you then undertake that ten shall be given for every year after this day?" (*Si Titius consul factus fuerit, tum ex hac die in annos singulos dena dari spondes?*), and after the space of three years the condition is performed; it is properly a matter of doubt whether an action can be brought with regard to this period of time. And the answer is that the stipulation is binding, so that with regard to what happened before the condition was fulfilled there is understood to be a guarantee for that time, so the meaning of it is this: when Titius has been made consul ten should be paid for each year, even taking into account all the time that has elapsed.

65. *Florentinus libro octavo institutionum.* Whatever you add to a stipulation that is irrelevant and has nothing to do with the act to be performed, is considered as surplusage, and does not invalidate the contract, as for instance, if you answer: "I sing of the man and his deeds; I undertake" (*Arma virumque cano*[52]*; spondeo*) it is none the less a binding contract. (1) And if there is a variation in the description of the thing which is promised, or in the name of the person, it appears not to matter, for you will be liable to the man who stipulated for silver pennies if you have undertaken to give the same amount of money in gold; and you will be liable, if to a slave who was stipulating

[52] This is a quotation from the first line of the Æneid, which was commonly used as an irrelevant remark.

for his master Lucius you undertook that something should be given to Titius, who is the same person.

66. *Paulus libro tertio ad legem Aeliam Sentiam.* If a man who is under twenty years of age stipulates with his debtor "that he will release a slave" (*servum manumissurum*) performance of the contract must not be exacted. But if the stipulator is twenty or over, there is nothing to prevent the slave being released, for the law [53] in question refers to minors.

67. *Ulpianus libro secundo ad edictum.* The stipulation: "Do you promise that 10,000 shall be secured?" (*Decem milia salva fore promittis?*), is a valid one. (1) Labeo says that he who has stipulated "that care shall be taken to ensure that he is given ten" (*decem dari sibi curari*) cannot sue for ten, for the promissor can perform his contract by giving security; and Celsus repeats this opinion in the Sixth Book of the Digest.

68. *Paulus libro secundo ad edictum.* If I shall have stipulated for a penalty, provided that you do not lend me money, the contract is clear and enforceable. But if I shall have stipulated in this way: "Do you undertake to lend me money?" (*Pecuniam te mihi crediturum spondes?*) the stipulation is uncertain because the question of what my interest in it is has to be considered.

69. *Ulpianus libro sexto ad edictum.* If a slave be dead it is impossible to produce him in court, and no liability on the penalty arises for not doing a thing that is impossible, as for instance, if anyone having contracted for Stichus to be given up dead, stipulates for a penalty if he be not given.

70. *Idem libro undecimo ad edictum.* A woman who had brought a marriage portion to my countryman Glabrio Isidorus, made him promise her infant daughter a dowry, in case she (the woman) should die while they were married, and she did die while they were married. The opinion prevails that there is no action on a stipulation here because those who cannot speak cannot make stipulations.

71. *Idem libro tertio decimo ad edictum.* When we

[53] The *lex Aelia Sentia* (4 A.D.), which was passed to restrict the release of slaves.

stipulate for a penalty in order that something may be done, the contract is properly framed as follows: "if it shall not so be done" (*si ita factum non erit*); and when to prevent something being done, in this form: "if anything be done contrary to that" (*si adversus id factum sit*).

72. *Idem libro vicensimo ad edictum.* Stipulations in respect to those things which are not capable of division cannot be apportioned, as for example, stipulations for a full right of passage (*via* [54]), for a right of passage on foot (*iter* [54]), for a right to drive cattle (*actus* [54]), for a right of passage for water (*aquae ductus*) and the rest of the servitudes. I think that the same thing applies whenever anyone has stipulated for something to be done, as for example, that a certain farm be handed over, or that a ditch be dug, or that a tenement house be built, or that certain work be undertaken (*stipulatio operarum* [55]), or anything of a similar nature to these contracts; for apportionment of such stipulations destroys them. Celsus, however, in the Thirty-Eighth Book of the Digest, declares that Tubero was of opinion that whenever we stipulate for something to be done, if it has not been done its value in money ought to be paid, and that consequently even in contracts of this kind the stipulation can be apportioned; and Celsus says that according to him it can be alleged that a right of action ought to be given for the fair value of the work. (1) If anyone has stipulated in this form: "if the work shall not be finished by March the 1st next, as much money as that work is worth shall be given?" (*si ante kalendas Martias primas opus perfectum non erit, tum quanti id opus erit, tantam pecuniam dari?*) the promise [56] does not become operative from the day when the work was hired out, but from after the 1st of March, for the defendant could not be sued on his promise earlier than the 1st of March. (2) Clearly, if anyone has stipulated "that a tenement house be shored up" (*insulam fulciri*) it is not necessary to wait till the house falls to bring an action,

[54] See *Dig.* XLV. i. 38, 6, note *ante.*
[55] See *Dig.* XLV. i. 54, 1, note *ante.*
[56] See note *dies cedit, Dig.* XLV. i. 72, 2 *post.*

nor in the case " that a tenement house be built " (*insulam fieri*), till enough time has passed in which to build it, but as soon as delay in performance of the contract has been made, a right of action arises and the performance of the contract is due (*dies cedit*).[57]

73. *Paulus libro vicensimo quarto ad edictum.* Sometimes delay must, in the nature of things, arise in reference to an unconditional stipulation, as for instance, if one stipulates for unborn offspring, or for crops not yet ripe, or for the building of a house ; and in such cases an action lies as soon as performance was possible having regard to the circumstances. Thus, when a man who is at Rome stipulates for something to be given at Carthage, a sufficient space of time is by implication allowed for him to arrive at Carthage. So too, if anyone stipulates for work and labour (*stipulatio operarum*[58]) from a freedman (*libertus*) no claim for performance arises until the work has been specified and not carried out. (1) If a slave left heir (*servus hereditarius*) stipulates, his stipulation will not be binding, unless he shall have actually entered upon the inheritance, just as if it was made conditionally ; and the same thing applies with regard to the slave of a man who is captive in an enemy's country.[59] (2) A man who has made delay in performance of his promise to Stichus, and has tendered compensation for it, thereby cures his delay ; for certainly anyone who was unwilling to accept the proffered compensation would be defeated in his claim by the defence of fraud.

74. *Gaius libro octavo ad edictum provinciale.* Some stipulations are determinate (*certae*) and others are indeterminate (*incertae*). A stipulation is determinate which is expressed to define both kind and quantity, as for instance, a stipulation for ten pieces of gold, or for the Tus-

[57] *Dies* in contracts refers to time, and here means the day when performance is due (*dies cedit*) ; *dies venit* refers to the day when performance can be claimed.

[58] See *Dig.* XLV. i. 54, 1, note *ante*.

[59] If a man remained a captive in the land of an enemy a loss of status (*capitis deminutio*) took place. See also *Dig.* XLV. i. 11, note *ante*.

culanian farm, or for the slave Stichus, or for 100 measures of the best African barley, or for 100 jars of the best Campanian wine.

75. *Ulpianus libro vicensimo secundo ad edictum.* But when it does not appear in the stipulation what kind and quantity are meant, the stipulation must be described as indeterminate. (1) Accordingly, if a man stipulates that he should be given a farm without describing it by name, or a slave generally, without naming him, or some wine or corn without specifying the quality, he brings an element of uncertainty into the contract. (2) Further, if anyone stipulates for "100 measures of good African barley" (*tritici Africi boni modios centum*), or for "100 jars of good Campanian wine" (*vini Campani boni amphoras centum*), the contract is considered indeterminate, because a better quality than "good" can be found; hence the specification "good" is not indicative of a thing certain, since that quality which is better than good is itself also good. But when each party stipulates for the best, he is understood to contract for something of which the goodness holds the highest place in goodness of quality; and consequently the specification of best is indicative of certainty. (3) If a man has stipulated for the usufruct of a certain farm he is considered to have introduced an element of uncertainty into the contract; for we apply this distinction strictly. (4) There is admitted to be some doubt whether, if anyone stipulates that he should be given the child that shall be borne of the slave woman Arethusa, or the produce that shall be grown on the Tusculanian farm, he is to be considered as a stipulator for a thing determinate. But Nature herself makes it amply clear that this contract is one of uncertainty. (5) The man, however, who contracts for the wine or oil or barley in a particular storehouse is understood to stipulate for a thing determinate. (6) On the other hand, a man who stipulates from Titius in this form: "Do you undertake to give what Seius owes me?" (*Quod mihi Seius debet, dare spondes?*), and the man who stipulates thus: "Do you undertake to give whatever you owe me under the will?" (*Quod ex testamento mihi debes, dare spondes?*) introduces an uncertainty into

the contract, though Seius owes me a thing certain, and though a thing certain is owed under the will. As a matter of fact, however, contracts of this last-mentioned kind can scarcely be distinguished from those alluded to earlier in reference to wine, oil, or barley which is placed in a storehouse ; and up to the present it appears that sureties (*fidejussores*) [60] are considered to promise a thing certain, provided only that the man on whose behalf they are bound owes something certain ; besides, they are asked to stipulate in the form : "Do you guarantee it ?" (*Id fide tua esse jubes ?*).[61] (7) The man who stipulates for something which consists in doing or abstaining from particular acts is considered to make an indeterminate stipulation ; in doing particular acts, as for instance, "that a ditch be dug" (*fossam fodiri*), "that a house be built" (*domum aedificari*), "that vacant possession be given" (*vacuum possessionem tradi*) ; in abstaining from particular acts, as for instance, "that nothing shall be done by you to obstruct my rights-of-way over your farm" (*per te non fieri, quo minus mihi per fundum tuum ire agere* [62] *liceat*), "that nothing shall be done by you to challenge my ownership of the slave Eros" (*per te non fieri, quo minus mihi hominem Erotem habere liceat* [63]). (8) When a man stipulates for one thing or another, as for example, for "ten or the slave Stichus" (*decem vel hominem Stichum*), it is properly a matter of some doubt whether he makes the contract determinate or indeterminate ; for on the one hand things certain are named, but on the other hand which of the two of them should more properly be paid is a matter of uncertainty. However, he who reserves for himself a right of selection by adding these words : "whichever I wish" (*utrum ego velim*) may be considered as having made a stipulation for a thing certain, since he may claim to be paid either the slave only or the ten only ; the stipulator, however, who does not reserve to himself a right of selection makes an indeterminate stipulation.

[60] *Gai.* III. 115 *et seq. ante.*
[61] *Gai.* III. 116 *ante.*
[62] *Dig.* XLV. i. 38, 6, note *ante.*
[63] See *Dig.* XLV. i. 38, note *ante.*

(9) He who stipulates for a principal sum and any interest whatever, makes a determinate and an indeterminate stipulation, and there are as many stipulations as there are matters contracted for. (10) This stipulation: "that the Tusculanian lands shall be conveyed" (*fundum Tusculanum dari*) shows itself to be determinate, and is framed so that the fullest rights of ownership shall be secured for the stipulator.[64]

76. *Paulus libro octavo decimo ad edictum.* If I shall have stipulated for "this or that, whichever I like" (*illud aut illud, quod ego voluero*) this right of choice is a personal one, and therefore such a right attaches to a slave or a son subject to his father's jurisdiction (*potestas*); yet when the stipulator has died before making his choice the benefit of the contract passes to his heirs. (1) When we stipulate for "whatever you are bound to give and render" (*quidquid te dare facere oportet*) all that is owed up to date is covered by the contract, but not future obligations as well (as in judgments); and therefore it is usual in the stipulation to add "shall be bound" (*oportebit*), or else the phrase, "at the present, or in the future" (*praesens in diemve*). This is done because whoever stipulates for "whatever you are bound to give" (*quidquid te dare oportet*) indicates a debt already owing; but if he wishes to include everything, he adds, "or shall be bound" (*oportebitve*) or the phrase "at the present or in the future" (*praesens in diemve*).

77. *Idem libro quinquagensimo octavo ad edictum.* When money has been promised for a specific day and in default of payment a penalty, by the death of the promissor before that day the penalty becomes due, although the promissor's estate has not begun to be administered.

78. *Idem libro sexagensimo secundo ad edictum.* If a son subjected to his father's jurisdiction (*filius familias*), who has made a stipulation subject to a condition, has been emancipated, and afterwards the condition is fulfilled, the father has a right of action on the contract, because in construing stipulations we regard the time at which

[64] The word *dare* has the technical signification of giving full legal ownership.

the contract was made. (1) When I stipulate for a farm, the produce gathered at the date of contracting is not included.

79. *Ulpianus libro septuagensimo ad edictum.* If security was given to the agent of a man who was himself present, no one denies that the principal has a right of action (*actio utilis* [65]) on the contract.

80. *Idem libro septuagensimo quarto ad edictum.* Whenever the language of a stipulation is ambiguous, it is best to accept the rendering that safeguards the subject matter of the action.

81. *Idem libro septuagensimo septimo ad edictum.* Whenever any person promises that someone else shall be produced in court, say for instance, one of his own slaves or a freeman, and adds no penal clause, questions may arise as to whether liability upon the contract is incurred. And, Celsus says, that even if the words, " and if he is not produced a penalty is to be given " (*nisi steterit, poenam dari*) be not added to this stipulation, whatever his appearance may be worth is included in it. And what Celsus says is correct: for he who promises to produce another man promises that he will do everything to ensure his appearance. (1) If an agent (*procurator*) has promised without the addition of a penal clause that another man should be produced in court, he can defend an action brought against him by showing that he did not contract on his own behalf, but on the behalf of the man whose business affairs he managed, and this applies with still greater force if the agent's stipulation is expressed to be " for as much as the appearance is worth " (*quanti ea res sit*).

82. *Idem libro septuagensimo octavo ad edictum.* No one can make a valid stipulation for something that is his own, but if he stipulates for the value of something of his own the contract is not void; it seems to be clear that I am right in stipulating that my own property should be restored to me. (1) If the slave stipulated for has died after delay in delivery caused by the promissor the promissor is nevertheless liable, just as if the slave had lived. (2) And the promissor who would rather litigate than give up the slave is considered guilty of culpable delay.

[65] See *Dig.* XLV. i. 38, 21, note *ante*.

83. *Paulus libro septuagensimo secundo ad edictum.* The business of contracting is carried on between stipulator and promissor. And therefore one who promises that he will give or do something on another's behalf is not bound; for each man ought to promise concerning himself only. And he who undertakes "there shall be no fraud now or hereafter" (*dolum malum abesse afuturumque esse*) not only denies there has been fraud, but promises also that he will take care that no fraud is committed; and the same thing applies in the stipulation for quiet enjoyment (*habere licere*), and also in the stipulation, "neither by you nor by your heir shall anything be done to prevent it happening" (*neque per te neque per heredem tuum fieri, quo minus fiat*). (1) If when I have stipulated for Stichus I mean one slave, and you another, no contract is made. And this opinion was held by Aristo. But the better opinion is that the slave referred to by the stipulator may be sued for. For the stipulation acquires its binding force from the consent of both parties to its terms, and a trial is ordered against the party unwilling to perform, and therefore credence should rather be given to the plaintiff; otherwise the defendant would always deny that he had agreed. (2) If when I stipulated for the slaves Stichus or Pamphilus, you answered that you would give me one, it is clear you are not liable and there was no answer referable solely to what was asked. (3) The case of amounts is different, as for instance, "Do you undertake that ten or twenty shall be given?" (*Decem aut viginti dari spondes?*), for here, even if you have promised ten, the answer is a good one, because in the case of amounts the smaller is in any event considered to have been promised. (4) Again, if I stipulate for several things, say for example, for the slaves Stichus and Pamphilus, although you promise one only, you are liable; for you appear to have properly answered one out of two stipulations. (5) A stipulation for things sacred (*res sacrae* [66]) for things holy (*res religiosae* [67]), or for things perpetually endowed for the public enjoyment (as for

[66] *Res sacrae.* See *Gai.* II. 4 *ante.*
[67] *Res religiosae.* See *Gai.* II. 4 *ante.*

instance, a market-place or a church), or for a freeman is invalid, although the sacred thing (*res sacra*) can become profane (*profana*), property endowed for public uses can be again applied for the benefit of individuals, and the freeman can be made a slave. For when anyone has promised that something not sacred (*res profana*) or the slave Stichus be given, he is liberated from his obligation, if without his intervention that thing becomes sacred (*res sacra*) or Stichus obtains his liberty, and the obligation is not recreated if in consequence of some other law the sacred thing again becomes profane (*res profana*) or Stichus is reduced from freedom to slavery. For then there would be one and the same ground both for release from contracts and for obligation under them, and for determining what cannot and what can be paid: if the owner of a ship that was promised on a stipulation breaks it up and reconstructs it from the same planks, his obligation remains, because it is the same ship. It is on this account that Pedius writes that the following statement may be properly made: "if I have stipulated for 100 jars of wine from a certain farm, I ought to wait until the wine is made; and if after it is made it is consumed without any negligence on the part of the promissor I ought to wait longer, until a second brew can be made and paid over; and during these vicissitudes the stipulation is either in suspense or enforceable." But these things really differ; for, when a freeman is promised, the time when he may become a slave ought not to be regarded, so that not even the following stipulation ought to have approval in reference to a freeman: "Do you undertake to give that man, when he becomes a slave?" (*Illum, cum servus esse coeperit, dare spondes?*), nor this one either (in reference to a sacred or holy place): "this land shall be given when it ceases to be sacred or holy, and becomes profane" (*eum locum cum ex sacro religiosove profanus esse coeperit dari*), because at the time of contracting no obligation is possible, and only those things which are of themselves possible (at the time) can become the subjects of contract. When we appear to stipulate for wine generally, and for some specific wine, time is tacitly included in the contract; a

freeman imports a particular species of man. And neither by civil law nor by the law of nature is the changed status and adverse fortune of a freeman to be regarded; for business is properly carried on with such things as can be immediately subjected to use and ownership. And if a ship has been broken up, with the intention that its planks may be put to some other use, even if this intention is changed and it is reconstructed, yet the first ship must be held to have been destroyed, and the reconstructed ship must be considered a different ship entirely; but if for the purpose of repairing the ship all the planks were removed, the ship is not meanwhile considered to be destroyed, and when they are put back into place it becomes the same ship again; just as building materials taken out of houses with the intention of being replaced are part of the houses, but if the materials be pulled right down to the ground, then the house is a different one, even if it be restored with the same materials. This consideration governs also those stipulations given by the praetor (*stipulationes praetoriae*[68]) to provide for restitution of property, in determining whether the property is the same or not. (6) If I shall have acquired by way of profit (*ex causa lucrativa*) something which I stipulated I should have as a profit, the stipulation loses its force. And if I survive the owner as his heir the stipulation is merged. If however the deceased man bequeathed the thing in question away from me, the heir, an action on the stipulation lies; and the same thing applies if the legacy was only a conditional one, because if the debtor had himself paid the thing that was bequeathed under a condition, he would not be discharged; but if on failure of the condition the property in question was preserved, the right of action would be lost. (7) If I stipulate for the slave Stichus who has died, provided only a dead man can be the subject of a legal claim for restitution, as for instance from a thief, Sabinus says my contract is a good one; in cases other than this, however, it is bad, because if liability was ever incurred the promissor is released by the slave's death. He would therefore give the same opinion if I stipulate for a slave who

[68] See *Dig.* XLV. i. 5, note *ante*.

has died after delay has taken place in delivery. (8) If anyone has promised that a slavewoman, who was pregnant, should be produced in a certain place, even if he produces her without her child, he is understood to produce her so as to satisfy the contract.

84. *Idem libro septuagensimo quarto ad edictum.* If I have stipulated that a tenement house be built and the time within which you could have finished it has passed, so long as I have not commenced an action it is agreed that you can be discharged from your contract by building it; but if I have already commenced an action, it will avail you nothing, even if you do build.

85. *Idem libro septuagensimo quinto ad edictum.* It should be pointed out that in the performance of a contract there are four classes of cases to be considered. For sometimes the subject of the contract is something which can be claimed from each of the heirs in separate shares; sometimes something which must be sued for in its entirety, and which cannot be paid in separate shares; sometimes something which is claimed in separate shares, but which cannot be paid except in its entirety; and sometimes something which ought to be claimed in its entirety although it admits of payment in separate shares. (1) The first classification applies to the promise of a sum certain; for both in suing and in payment the shares in the inheritance are regarded. (2) The second, to work which the testator had ordered to be carried out; for all the heirs are liable for the whole, because the execution of the work cannot be separated into parts. (3) But if I shall have stipulated, "I shall not be obstructed by you or your heir; and if I am obstructed damages shall be given?" (*per te heredemve tuum non fieri, quo minus eam agam; si adversus ea factum sit, tantum dari?*), and one out of several heirs of the promissor obstructs me, the opinion of those who think that all the heirs are liable for the act of one is the more correct, since although I am obstructed by one, yet I am not obstructed as to part of my right only; but the other heirs will make good their loss by an action for partitioning the inheritance (*judicium familiae erciscundae*). (4) And the case where the subject

matter of the contract may be sued for in proportionate shares, but can only be paid in its entirety happens for instance when I stipulate for a slave without specifying any particular one ; for the claim for him is a divisible one, but the contract can only be discharged by payment of the slave as a whole : were it otherwise, portions of him might be properly paid away to different people ; and this the dead man could not have done, nor would the stipulator get what he contracted for. The same law applies if any man has promised either to pay 10,000 or to give a slave. (5) The action ought to be brought for the whole subject matter, though payment of a share is a good discharge (for each heir) when (for instance) we sue for eviction ; for the vendor's heirs are properly sued on the whole liability, and ought all to defend the action, and if one shirks responsibility in any way all are bound ; but payment in proportion to his share of the inheritance is imposed upon each. (6) So too if a stipulation was made in the following form : " If the Titian farm is not conveyed, 100 shall be given ? " (*Si fundus Titianus datus non erit, centum dari ?*), unless the whole of the farm is conveyed the penalty of 100 becomes due, and it is of no avail that parts of the farm are handed over and there is default as to one part, just as for the purpose of releasing a security it is of no avail to pay a creditor in part. (7) Anybody under a conditional liability who has taken care to prevent the fulfilment of the condition is nevertheless liable.

86. *Ulpianus libro septuagensimo nono ad edictum.* The saying that there are as many stipulations as things applies in the case where the things are specified in the stipulation ; but if they have not been specified there is but one stipulation.

87. *Paulus libro septuagensimo quinto ad edictum.* No one can validly stipulate that something shall become his in consequence of an event by reason of which it would become his.

88. *Idem libro sexto ad Plautium.* Delay in payment injures also the defendant's surety (*fidejussor*[69]). But if the

[69] See *Gai.* III. 115 *et seq.*

surety has tendered a slave and the defendant has caused delay, if Stichus dies the surety must be released. But if the surety killed the slave the defendant is released, but the surety can be sued on the contract.

89. *Idem libro nono ad Plautium.* If after three years have passed I shall have stipulated with a farmer, to whom I have let my farm on a five years' agreement: "whatever you ought to render or perform?" (*quidquid te dare facere oportet?*), nothing further is included in this stipulation than what is then owing; for the stipulation refers only to what ought to be given up to the then present time. But if the words, "or shall be bound" (*oportebitve*) be added, even the future obligation is included.

90. *Pomponius libro tertio ex Plautio.* If we have stipulated for a penalty every month in proportion to the statutory interest if the principal be not repaid, even if the contract in reference to the principal is the subject of proceedings in court, yet the penalty still goes on increasing because the money is not in fact repaid.

91. *Paulus libro septimo decimo ad Plautium.* Suppose I have been promised a slave, and the slave has died before any delay has arisen; if the promissor killed him the case is clear. But if the promissor neglect the slave when he is ill, then when we come to consider whether he ought to be held liable on the stipulation the question is, firstly, is a man who has promised to hand over a slave liable in the same way as in the enfranchisement of a slave by *vindicatio*,[70] the owner, if he has neglected the slave, is liable by reason of his neglect? or secondly, does the liability in tort which attaches to the stipulation, apply only to what he has done and not to what he has omitted to do? And the second is the better opinion, because he who promised a slave shall be given, is bound to give, and not to do anything further. (1) But if of subject of the contract is governed by the laws the mankind (*in rebus humanis*), but is incapable of conveyance, as, let us say, land that has been made holy (*religiosus*) or sacred (*sacer*), or a slave that has been freed, or even captured by the enemy, negligence is attributable

[70] See *Gai.* I. 138, note *ante.*

in such a way that if the thing in question belonged to the promissor himself, either at the time of contracting or afterwards became his, and one of these things happened, the promissor is nevertheless liable, and the same thing follows if the change is caused by a third party after the subject of the contract was alienated by the promissor. But if it was someone else's property, and any such thing happened through a third party, the promissor is not liable, because he has not done anything, except where something of this sort happened, after he had made delay in delivery; and Julian accepts this distinction. And so if a slave who belonged to the promissor was taken away from him in consequence of a prior right of action, because the slave had been conditionally promised his freedom (*statuliber*), the promissor ought to be considered in the same position as he would be if he had promised another man's slave, because the one promised had ceased to belong to him without any default on his part. (2) A question also arises as to whether a man is liable who, in ignorance of the fact that he owed the slave, killed him; and Julian thinks this is the case when a man releases a slave without knowing his release was demanded from him by codicil. (3) As a consequence, we must inquire how the accepted opinion of the ancient lawyers, that whenever the debtor's negligence prevents performance the obligation is continued, is to be applied. And of course if the promissor makes payment impossible this opinion is readily understood; if, however, he has only delayed, there is some doubt whether, if there is no subsequent delay, the earlier delay is annulled. And Celsus, as a young man, writes that a man who has made delay in giving up the slave Stichus, whom he had promised, can cure that delay by subsequently tendering the slave; for this question depends on what is right and fair; and in the matter of justice and fairness, it frequently happens, he says, that most harmful mistakes are made for the sake of legal technicalities. This is no doubt a correct opinion, and has even the support of Julian; for when the question at issue is damages, and the case is equally strong on both sides, why should not the man who defends prevail over the man who brings

the action? (4) Now let us see with regard to what persons that opinion of the ancient lawyers applies. This inquiry is twofold, for we must first inquire what persons make an obligation continuous and to whom they make it extend. Now clearly the principal debtor makes a contract that continues: but whether accessory parties do so is doubtful. Pomponius thinks they do: for why should a surety (*fidejussor* [71]) nullify his own obligation at his own will? And his opinion is correct; so the obligation is a continuing one both for the sureties themselves and their successors. They make a continuing obligation also for their own accessory parties, that is to say, for their sureties (*fidejussores*), because they have promised in reference to the whole subject matter of the contract. (5) Whether a son subjected to the paternal jurisdiction (*filius familias*), who has promised at the command of his father, continues his father's obligation if he kills the slave, must be considered. Pomponius thinks he does, evidently regarding the father who ordered the contract as a sort of accessory party. (6) The result of this opinion is this, that the slave can still be claimed: but it is thought credit can be given to the promissor for the slave, and at the same time the surety (*fidejussor* [72]) can be treated as liable under the contract. But whether this obligation can be renewed is doubted, because we cannot stipulate either for a slave who is dead or for money that is not owed. I think a novation can be made if it be negotiated between the parties themselves; and Julian thinks so too.

92. *Idem libro octavo decimo ad Plautium.* If I stipulate as follows: "nothing shall be done by you to prevent me or my heir gathering the grape harvest?" (*per te non fieri, quo minus mihi heredique meo vindemiam tollere liceat?*) a right of action is given to my heir as well.

93. *Idem libro tertio ad Vitellium.* If I have stipulated in the following form: "nothing shall be done by you to prevent me selecting a slave from those you have?" (*per*

[71] See *Gai.* III. 115 *et seq. ante.*
[72] See *Gai.* III. 115 *et seq. ante.*

te non fieri, quo minus hominem ex his, quos habes, sumam?) I shall have a right of choice.

94. *Marcellus libro tertio digestorum.* If anyone has stipulated that barley shall be given: it is a question of fact and not of law. Therefore if he was thinking of any barley, that is to say, of a certain kind and quantity of barley, it will be considered as though it had been expressed; but, on the other hand, if he wished to indicate the kind and quantity, but did not do so, he is held to have contracted for nothing, not even a single measure.

95. *Idem libro quinto digestorum.* He who stipulates that a tenement house be built only acquires a contract if it appears in what place he wished the house built, and if it was to his advantage it should be built there.

96. *Idem libro duodecimo digestorum.* If the man who owes me a slave under a stipulation detects him in the commission of crime and kills him, he does so with impunity, and no action (*utilis actio* [73]) will lie against him.

97. *Celsus libro vicensimo sexto digestorum.* If I shall have stipulated in this form: "you shall appear in court? If you do not appear a hippocentaur shall be given?" (*te sisti? nisi steteris, hippocentaurum dari?*) it will be the same as if I had stipulated only "you shall appear in court" (*te sisti*). (1) I can validly stipulate with you in this form: "will you pay on behalf of Titius?" (*Titii nomine te soluturum?*), and it is not the same as the stipulation, "Titius will give?" (*Titius daturum?*); and under the former stipulation I have a right of action, so long as my interests are involved, and therefore if Titius be a wealthy man, I cannot claim anything under that stipulation; for in what way does it benefit my interests that you should undertake something when, if you do not perform it, my money will be equally safe? (2) "If I marry you, do you undertake that ten shall be given?" (*Si tibi nupsero, decem dari spondes?*). I think an action ought to be denied on this stipulation when the reason for it is known, and the reason of a contract of this kind is often capable of proof. I am of the same opinion if a man has stipulated in this way with a woman, and not for a dower.

[73] See *Dig.* XLV. i. 38, 21, note *ante*.

98. *Marcellus libro vincensimo digestorum.* I think it is possible for me to stipulate conditionally for what is mine already, or for a right-of-way (*via* [74]) to a farm although at the time the farm is not mine; or if this be not the case, and I have conditionally stipulated for another man's farm, and it has become mine as a gift (*ex causa lucrativa*), the stipulation is immediately terminated, and if the owner of the farm stipulated conditionally for a right-of-way (*via*), as soon as the farm is alienated the contract ceases to exist, and this is chiefly in accordance with the opinion of those who think that even those matters which have been definitely arranged are cancelled when the circumstances become such, that had they existed at the time of the arrangement, the arrangement could never have been made. (1) A question arises under this stipulation: "Do you undertake to shore up the tenement house?" (*Insulam fulciri spondes?*), as to when the cause of action arises. Clearly we need not wait until the building falls: for it is more to the stipulator's advantage that it should be supported than left to fall. No right of action however, properly accrues until enough time has passed in which the contractor could have shored up the building.

99. *Celsus libro trigensimo octavo digestorum.* Whatever is intended to strengthen a contract is considered omitted unless it is expressed clearly in words; and we usually construe contracts in the promissor's favour, because the stipulator was free to frame it in words of the widest meaning. But on the other hand, the promissor ought not to be listened to if he had any special interest in confining the action rather to certain particular implements or slaves. (1) If I shall have stipulated in this manner: "if you do not go up to the Capitol within two years there shall be given?" (*si intra biennium Capitolium non ascenderis, dari?*), no right of action properly arises till two years have passed; for even though the words are ambiguous, they are understood in this way, if it was undoubtedly true that you did not go up to the Capitol.

[74] See *Dig.* XLV. i. 38, 6, note *ante*.

100. *Modestinus libro octavo regularum.* A condition referring to time past, not to time present only, either immediately annuls the contract or else does not affect it at all.

101. *Idem libro quarto de praescriptionibus.* Minors over the age of puberty (*puberes*) can render themselves liable on stipulations without the intervention of their guardians (*sine curatoribus*).

102. *Idem libro quinto responsorum.* The vendors under a contract, guaranteed the purchaser against eviction to the extent of his interest ; and in particular promised, upon his stipulation, that they would be responsible should expense be incurred if the title was contested in court. After the death of the purchaser one of the vendors sued his (the purchaser's) heirs, claiming that the purchase money was owing to him ; and when the heirs had proved that the purchase money had been paid, they sued for the expenses incurred in and about their defence under the stipulation. Modestinus answered, that if the vendors promised in reference to those expenses which should be incurred on account of an action instituted in reference to the rights of ownership (*proprietas*), what was spent could by no means be claimed under the stipulation, when one of the vendors sued for the price, which had in fact already been paid.

103. *Idem libro quinto pandectarum.* A freeman cannot be the subject of a stipulation, because it is impossible to claim that he should be handed over, and his value cannot be paid, any more than if anyone has stipulated for a dead slave or for a farm belonging to the enemy.

104. *Javolenus libro undecimo ex Cassio.* When a slave has bargained money for his liberty and has put himself under obligation on this account ; even if the slave is released by some other person he is rightly held liable, because the question is not by whom he was released, but simply was he released.

105. *Idem libro secundo epistularum.* Do you think I have an action on the stipulation in the following circumstances ? I have stipulated that either the slave Dama or the slave Eros be given : after you have tendered Dama I have made delay that has prevented me receiving him ;

Dama has died. He answered, following the opinion of Masurius Sabinus: I think you have no right of action on the stipulation; and he was correct in his opinion, for if the delay, in consequence of which what is owed is not paid, is not caused by the debtor, he is forthwith released from his obligation.

106. *Idem libro sexto epistularum.* He who stipulates for one out of several farms, all having the same name, without anything to distinguish which of them he refers to, makes an uncertain stipulation, that is to say, he stipulates for whichever of them the promissor wished to give. And the wish of the promissor remains in suspense until what is promised is paid.

107. *Idem libro octavo epistularum.* Do you think such a stipulation as this a dishonourable one or not? A father names as his heir his son whom Titius has adopted, on condition that he be freed from the paternal jurisdiction (*patria potestas*); the adopted father was willing to emancipate him only on the condition that the person with whom he should stipulate for a certain sum, gave it to him if he carried out the enfranchisement. After his emancipation the son became heir; the adopted father now sues for the money under the stipulation referred to above. He answered: I do not think the stipulation is dishonourable, inasmuch as he would not otherwise have released the son; nor can the stipulation be considered an unjust one if the adopted father wished to have something on account of which the son would be more solicitous for him after his release.

108. *Idem libro decimo epistularum.* I stipulated with Titius in the following form: "If any woman ever marries me, do you undertake to give ten as a dowry?" (*Si qua mihi nupserit, decem dotis, ejus nomine dare spondes?*); is such a stipulation binding? He answered: If upon my stipulation dowry is promised in the following form: "Do you undertake to give ten as a dowry, whatever woman I marry?" (*Quamcumque uxorem duxero, dotis ejus nomine decem dare spondes?*) there is no reason why the money should not be owed when the condition has been fulfilled; for even a condition to be performed by an unknown person can support a contract, as for example, "If anyone

shall go up to the Capitol, do you undertake to give ten ? " (*Si quis in Capitolium ascenderit, decem dare spondes?*), " If anyone sues me for ten, do you undertake to give as many ? " (*Si quis a me decem petierit, tot dare spondes?*). There can be no reason why the same answers should not be given, when a marriage portion is promised. (1) No promise can be held good which depends on the will of the promissor.

109. *Pomponius libro tertio ad Quintum Mucium.* If I have stipulated in this form : " Will you give ten or fifteen ? " (*Decem aut quindecim dabis?*), ten are owed. And if in this form : " Will you pay after a year or two years ? " (*Post annum aut biennium dabis?*), payment is due after two years, for in stipulations that which is less in quantity or longer in time is retained, and takes effect in the contract.

110. *Idem libro quarto ad Quintum Mucium.* If I stipulate for ten for myself and Titius, when I am not subject to his jurisdiction (*potestas*), the whole ten are not owed to me, but five are owed only ; for the other share is not considered, so that what I contracted for invalidly on behalf of a stranger may not increase my share. (1) If I have made the following stipulation with you : " Do you undertake to give me whatever of your clothing is female attire ? " (*Vestem tuam, quaecumque muliebris est, dare spondes?*) regard should be had rather to what is in the stipulator's mind than to what the promissor thinks of, so that what really exists ought to be considered, and not what the promissor expected. And therefore if the promissor was accustomed to use certain feminine attire, it must be handed over.

111. *Idem libro quinto ad Quintum Mucium.* If I shall have stipulated " that you shall do nothing to prevent me using that house " (*per te non fieri, quo minus mihi illa domo uti liceat*) is liability under the stipulation incurred if you do not prevent me but prevent my wife, or, in the contrary case, when my wife stipulates, if you prevent me ? And speaking broadly, these words are accepted in that sense. For if I stipulate, " that you shall do nothing to obstruct my rights-of-way " (*per te non fieri,*

quo minus mihi via itinere actu[75] *uti liceat*), if you do not obstruct me, but another going in my name, you must know that the contract is broken.

112. *Idem libro quinto decimo ad Quintum Mucium.* If any man has stipulated for the slaves Stichus or Pamphilus, whichever he likes: he sues for the one he has chosen, and only that one will be the subject of the obligation. But to ascertain whether he can alter his choice and claim for the other slave, the wording of the contract must be referred to whether it was, "whom I shall have chosen" (*quem voluero*) or "whom I shall choose" (*quem volam*); for if it was "whom I shall have chosen" (*quem voluero*), when he has once selected he cannot change his mind; if however, the wording is more elastic, such as, "whom I shall choose" (*quem volam*), he will be entitled to alter his choice any time prior to bringing an action. (1) If anyone has stipulated as follows: "Will you give security for 100 *aurei*?"[76] (*pro centum aureis satis dabis?*) and has sued the defendant for that amount: Proculus tells us to what extent the stipulator must always be interested to make a contract of suretyship binding, so that either the whole of the principal is involved, as for instance, when the promissor is not able to pay at all, or less than the whole, if the debtor is only able to pay a part, or nothing at all, if the debtor was so well off that it was not to the stipulator's interest at all to take security from him; ability to pay is judged not so much by the amount of the debtor's patrimony as by the extent of his credit.

113. *Proculus libro secundo epistularum.* If I have stipulated that I should be paid a penalty, if work to my selection be not completed by the first day of June, and have subsequently extended the time for completion: do you think, Proculus, I can truly claim that the work selected is not finished before the 1st of June, when on my own discretion I have named another more distant date for completion? Proculus answered: There is every reason why we should distinguish whether the delay which prevented completion of the work before the 1st of June

[75] See *Dig.* XLV. i. 38, 6, note *ante*.

[76] The standard gold coin of Rome, worth about a guinea.

as required by the stipulation, was not caused by the promissor, or whether the stipulator postponed the date to the 1st of August after completion was already impossible by the 1st of June. For if the stipulator extended the time, after completion was already impossible by the 1st of June, I think the penalty is incurred, and it is immaterial that there was a time before the 1st of June when the stipulator did not desire completion by that date ; that is to say, when he did not select work to be done that could not possibly be done in time. Or if this is not correct, even if the stipulator died on the day before the 1st of June, the penalty would not have been incurred, since the dead could not have selected, and there was some time after his death supervening in which the work could have been finished. And it is probable that if before the 1st of June it becomes evident that the work cannot be completed before that date, the penalty is incurred. (1) When the seller has promised the buyer sureties (*fidejussores* [77]) to secure payment and delivery of the thing sold : the buyer now desires to obtain delivery : he who promised this should be done under that stipulation is causing delay : what are the rights of the parties ? Proculus answered : The damages ought to be determined at the amount of the plaintiff's loss in consequence of the non-delivery.

114. *Ulpianus libro septimo decimo ad Sabinum.* If I stipulate for a farm to be conveyed on a particular day, and it is the vendor's fault that it is not delivered on that day, I shall have a right of action for the damages incurred by reason of the delay.

115. *Papinianus libro secundo quaestionum.* If I shall have stipulated thus : " You shall appear in a certain place : if you do not, do you undertake that fifty *aurei* shall be given ? " (*Te sisti in certo loco : si non steteris, quinquaginta aureos dari spondes?*), if the day in the stipulation was omitted in error, when the action is brought for appearance on a certain day, the stipulation sued on will be an imperfect one, just as if I had stipulated for things measured by weight, number, or bulk without adding the weight, number, or bulk required, or for a tenement house to be

[77] See *Gai.* III. 115 *et seq. ante.*

built without pointing out the site, or for a farm to be conveyed without adding its name. But if it was intended from the first that you should appear on any day whatever, and if you did not appear pay a penalty, like any conditional stipulation, the contract will be binding, and will not be broken until it has been shown that the promissor cannot possibly appear. (1) But if I have stipulated in this form: "if you do not go up to the Capitol" (*si in Capitolium non ascenderis*) or "If you do not go to Alexandria, do you undertake 100 shall be given?" (*Alexandriam non ieris, centum dari spondes?*) the stipulation is not broken immediately, although you might have had the chance to go up to the Capitol, or might have been able to reach Alexandria, but liability is only incurred when it is quite certain that you cannot go up to the Capitol or reach Alexandria. (2) So too if anyone stipulates thus: "Do you undertake to give 100, if you have not given the slave Pamphilus?" (*Si Pamphilum non dederis, centum dari spondes?*). Pegasus answered that the stipulation is not broken until it has ceased to be possible that Pamphilus should be given. But Sabinus thought from the intention of the parties, action ought to be brought immediately after the slave might have been given, and that as long as it was not the promissor's fault that the slave was not given, it was not possible to sue on the stipulation, and he quoted in support of this the example of a legacy of provisions. And indeed Mucius wrote that an heir, if he could give the provisions and did not do so, is to be held immediately liable for the money, and this was accepted, having regard to the wish of the deceased and the nature of the legacy itself, for expediency's sake. And so the opinion of Sabinus can be accepted, if the stipulation is not framed so as to be conditional, as for instance, "If you do not give Pamphilus, do you undertake to give his value?" (*Si Pamphilum non dederis, tantum dare spondes?*), but if the stipulation is framed thus: "Do you undertake that Pamphilus shall be given? If he be not given, do you undertake that his value shall be given?" (*Pamphilum dari spondes? Si non dederis, tantum dari spondes?*). This will undoubtedly be true, when the transaction is held to be that if the slave

be not paid, both the slave and the money are owing. But if it is provided that the money only, and not the slave, is owed, the same opinion will be supported, since the intention is shown to have been that either the slave should be given or the money sued for.

116. *Idem libro quarto quaestionum.* If, after having stipulated for ten from Titius, you stipulate with Maevius for whatever you fail to receive from Titius, Maevius clearly runs a risk of liability for the whole amount. And if you sue Titius for ten, Maevius will not be released unless Titius has paid. Paulus observes: Here Maevius and Titius are not both defendants on the same contract, but Maevius is liable under condition if the money cannot be recovered from Titius; therefore, when Titius is sued Maevius is not released (for whether he will ever be liable is as yet uncertain), and if Titius has paid, Maevius (who is not yet liable) is not released, since the condition of the stipulation has failed, and Maevius cannot be properly sued while the condition of his liability under the stipulation remains unfulfilled; for no claim properly arises against Maevius until the case against Titius has been disposed of.

117. *Idem libro duodecimo quaestionum.* If, when I have stipulated for the 100 slaves that I or my heir shall choose, I have left two heirs before I have chosen, the benefit of the stipulation is exactly halved; it will be different if they had succeeded to slaves already chosen.

118. *Idem libro vicensimo septimo quaestionum.* If a freeman, who in all good faith believes himself to be my slave, promises something to me as stipulator, it must be binding from every point of view, although he promises something that belongs to me; for what can prevent a freeman from being liable? I shall not however, be bound, if under the same circumstances I promise when he is the stipulator; for in what way could he bring an action against me for something which he would have obtained for me if he had made the stipulation with anyone else? So in this respect he will be on the same footing as a usufructuary slave, or the slave of another man, who in all good faith believes himself to be my slave. But

if a slave over whom usufruct is enjoyed, or the slave of another man, who believes himself in good faith to be slave to another master, promises something of his own to a purchaser, no action against the slave's earnings (*actio de peculio*) will be given to the master: for in these cases they are understood to belong to the master. (1) In the stipulation: "Do you undertake that ten shall be given to-day?" (*Decem hodie dari spondes?*) I have said that the money can be sued for on that day and the action is not considered premature, although the day of the stipulation is not ended, which is the law when other times are specified (for what may be paid within an agreed time ought not to be sued for). In the case set out above the day is not considered to have been inserted to postpone the right of action, but is so answered to indicate the present time. (2) "Do you undertake to give ten to me or Titius, whichever I wish?" (*Decem mihi aut Titio, utrum ego velim, dare spondes?*). Here, regarding what ought to be given to me, the contract is certain; as regards what ought to be paid to Titius, uncertain. Suppose that I have promised a penalty if Titius was not paid, it would appear to be to my interest that payment should be made to Titius rather than to me.

119. *Idem libro trigensimo sexto quaestionum.* A general clause against fraud (*clausula doli*) annexed to a stipulation does not apply to these parts of it which are specifically protected against fraud.

120. *Idem libro trigensimo septimo quaestionum.* If I have stipulated thus: "Do you undertake that this sum of 100 *aurei* shall be given?" (*Hanc summam centum aureorum dari spondes?*), although this phrase is generally understood to mean: "if it is only 100 *aurei*" (*si modo centum aureorum est*), this addition does not amount to a condition, for if there are not 100 *aurei* the stipulation is void; to word the stipulation in the form of a condition which refers not to the future, but to present time, is not approved, even if the contracting parties were ignorant of the truth.

121. *Idem libro undecimo responsorum.* On this part of a written bond: "the first party stipulates and the second

gives his undertaking that there shall be no fraud, now or hereafter, in reference to this matter and to this promise " (*dolumque malum huic rei promissionique abesse afuturumque esse stipulatus est ille, spopondit ille*) an action would be uncertain. (1) A woman with the intention of binding by stipulation the man she was about to marry, had stipulated for 200 if during their married life he returned to the habit of concubinage. I answered that there was no reason why, if the condition be fulfilled, the woman could not sue for the money on a contract which is based upon good morals. (2) A stipulation made with a promissor in exile (*deportatus in insulam*), and framed thus: " when you shall die, there shall be given ? " (*cum morieris, dari?*) creates no liability except when he is dying. (3) A stipulation against the fraud of the promissor by the nature of the case binds his heir, just as in all other contracts, as, for instance, in the contract of mandate (*mandatum* [78]) and the contract of deposit (*depositum* [79]).

122. *Scaevola libro vicensimo octavo digestorum.* A man who had received at Rome a loan to be paid in a distant province three months hence, contracted by stipulation that payment should be made there. After a few days he said in his creditor's presence at Rome, that he was prepared to pay it at Rome deducting that sum he would have had to give his creditor as interest. The question is whether, since he had offered the whole sum for which he was liable, he can be sued for the whole on the appointed day and in the place where payment was promised. He answered, the stipulator can sue on the appointed day at the place where payment was promised. (1) Callimachus received from Stichus the slave of Seius a loan in connection with a shipping enterprise from Berytus in the province of Syria to Brentesium: the money was lent for the whole 200 days of the voyage, and was secured by a mortgage on the goods acquired in Berytus and taken

[78] *Mandatum* was a contract to perform acts of service at request and gratis, on condition of being indemnified against claims arising in consequence of performance of the contract.

[79] *Depositum* was a contract for keeping anything in safe custody gratis, and until its return is demanded.

to Brentesium and on those that were to be bought at Brentesium and brought back in the ship to Berytus : and it was agreed between them that when Callimachus arrived at Brentesium he should set out thence by sea for Syria before the 13th of September next ensuing. After he had purchased and loaded up the other goods, or if he did not purchase the goods within the time above-mentioned, and did not set sail from Brentesium, he should repay the loan forthwith, as if the voyage was finished, and he should pay all the expenses to those claiming the money so that they could take it back to Rome : and Callimachus promised that these things should be properly and faithfully discharged on the stipulation of Stichus, the slave of Lucius Titius.[80] And after the goods had been loaded on the ship before the date above-written, according to the agreement he set sail for Syria with Eros, a fellow-slave of Stichus : the ship having sunk, a question was put whether, since Callimachus has remained on the ship during the time allowed by the contract for conveying the goods, and within which he ought to have returned to Rome the money taken from Brentesium, the consent of Eros who was sent with him, and who had no further authority or orders in reference to the money above referred to after the day agreed upon, than that he should take it to Rome after he had obtained it, avails him anything, or whether, despite this, Callimachus is liable to the master of Stichus for the money in an action on the contract. He answered that he would be liable according to what has already been set forth. In addition I ask whether, if Eros, the slave above referred to, had agreed that Callimachus should set sail after the date above-written, he would deprive his master of the right of action already accrued. He answered that he could not do so, but that if the slave had discretion given him that the money should be restored when and where he pleased, this would give rise to an equitable defence (*exceptio*). (2) Flavius Hermes gave his slave Stichus to be enfranchised, and stipulated as follows in connection with him : " Flavius Hermes stipulates and Claudius undertakes that if the slave Stichus,

[80] Lucius Titius appears to refer to the same person as Seius.

concerning whom the agreement is made, and whom I have this day given you that he may be released, be not released and liberated by you and your heir, and this is not caused by any fraud of mine, fifty shall be given as a penalty" (*Si hominem Stichum, de quo agitur, quem hac die tibi donationis causa manumissionisque dedi, a te heredeque tuo manumissus vindictaque liberatus non erit, quod dolo malo meo non fiat, poenae nomine quinquaginta dari stipulatus est Flavius Hermes, spopondit Claudius*). I ask whether Flavius Hermes can sue Claudius for the release of Stichus. He answered, there is no reason why he should not do so. Further I ask whether, if the heir of Flavius Hermes wished to claim the penalty above-named from the heir of Claudius, the heir of Claudius can grant Stichus his liberty, in order to escape liability on the penalty. He answered that he can do so. Again I ask whether, if the heir of Flavius Hermes is unwilling to sue the heir of Claudius on the contract above set out, liberty ought nevertheless to be given to Stichus by the heir of Claudius under the agreement which was made between Hermes and Claudius, as shown in the stipulation above written. He answered that it ought to be given. (3) Joint-heirs to an estate, after they had divided the inheritance, retained one estate in common under this agreement, that if any of them wished to alienate his share he should sell it either to his co-heir or his co-heir's successor for 120; and in case anyone should do anything contrary to this they mutually stipulated for a penalty of 100: I ask whether, when a woman, one of the co-heirs, had frequently and in the presence of witnesses, requested and desired the guardians of a co-heir's children that according to the agreement they should either buy or sell, and they had done neither, if the woman has sold outside, the penalty of 100 can be exacted from her. He answered, according to what has been already set forth, that a defence of fraud would protect the woman. (4) Agerius, a son subject to the paternal jurisdiction (*filius familias*), undertook on the stipulation of a slave of Publius Maevius that he would pay whatever it was proved that his father owed Publius Maevius: the question arises after the father is dead, and before it is proved what and how

much he owed, whether, if an action was brought against his heir, or other successor, and the debt ascertained, Agerius is liable. He answered, if the condition is not performed liability on the stipulation is not incurred. (5) Seia, the heir of one guardian, after making an agreement by a single stipulation with the heir of a ward, paid the greater part, and gave security for the balance ; but the heir immediately refused to keep to the bargain and brought an action (*actio tutela* [81]), and being defeated appealed to the proper judge, and from him again to the chief judge, and his appeal was decided not to be well grounded. The question is, when delay was caused by the heir of the ward which prevented the money due under the stipulation being paid by the heir of the guardian, and the heir of the ward never sued for it, whether interest is owed to him at the present time by the heir of the guardian. He answered : if Seia had not ceased to tender the money due under the stipulation interest is not due at law. (6) Two brothers divided up an inheritance between themselves, and each agreed to do nothing contrary to the division, and if either one did anything contrary to it he promised the other a penalty : after the death of one the survivor claimed the inheritance from his deceased brother's heirs, pretending that it was owed to him under a trust (*ex causa fideicommissi*) created by their father, just as if an agreement had been come to on this point also, and the case was decided against him : the question is, whether liability on the penalty is incurred. He answered that according to what has been already explained the penalty is incurred.

123. *Papinianus libro primo definitionum.* If a stipulation has been made for doing, or causing to be done, something disgraceful, it is void from the very beginning.

124. *Idem libro secundo definitionum.* " Do you undertake that a tenement house shall be built on that place within two years ? " (*Insulam intra biennium illo loco aedificari spondes?*). Liability on the stipulation does not arise before the two years are up, even though the promissor

[81] An action for damages against a guardian (after he has vacated office), or his heirs, for loss sustained by any unlawful act by the guardian in the course of his duty.

has not built and there is not enough time left in which the house could be built; for the effect of a stipulation which has a day fixed for completion at the beginning is not altered by what happens afterwards. And the same ruling is accepted with regard to a stipulation made for an appearance in court (*causa judicio sistendi*), so that liability under the contract clearly does not arise before the time fixed in the contract for performance, even though it is already manifest that the stipulation cannot be performed in the time remaining.

125. *Paulus libro secundo quaestionum.* When we stipulate as follows: "whatever you ought to give and do" (*quidquid te dare facere oportet*) nothing more than what was owed at the time the contract was made is included in the stipulation; the wording of the stipulation itself shows this.

126. *Idem libro tertio quaestionum.* If I have stipulated in the following form: "If Titius is made consul, do you undertake to give ten every year from this day?" (*Si Titius consul factus fuerit, tunc ex hac die in annos singulos dena dare spondes?*), after three years, if the condition has been performed, thirty can be claimed. (1) Titius has stipulated for a farm without the usufruct of it, and also for the usufruct of it, from Maevius: there are two stipulations, and there is less in that usufruct which anyone promises by itself than in that which accompanies ownership. And then if the promissor conveyed the usufruct, and the stipulator lost the right by making no use of it, by subsequently making delivery of the farm without the usufruct, the promissor would be discharged. The same thing does not happen in the case where a man has promised a farm with the full rights attaching thereto, and has conveyed the usufruct, and after the usufruct has been lost has handed over the farm without the right of usufruct; in the former case he is relieved from giving the usufruct, in the latter, no part of the obligation is excused, unless the farm is made the stipulator's property with full rights. (2) "Chrysogonus, a slave and the manager of Flavius Candidus, wrote, and my master personally signed and sealed it, that he had accepted from Julius

Zosas, who was managing the business of Julius Quintillianus in his absence, a loan of 1000 *denarii*. Zosas the freedman (*libertus*), and business agent of Quintillianus, stipulated, and my master Candidus undertook, that the money should be repaid to Quintillianus or his heir to whom it would belong, on the next ensuing 1st of November. And Julius Zosas further stipulated, and Flavius Candidus my master undertook, that eight *denarii* should be paid as interest when the money should be repaid, if payment was not made on the date above-written." My master countersigned this statement. I answered: we cannot acquire the benefit of any obligation through a free person who is neither subjected to our jurisdiction nor honestly believes himself to be our slave. Clearly, if a free man (*liber homo*) lends money of his own or of ours in our name, and so that repayment may be made us, we acquire a contract for money lent; but whatever a freedman (*libertus*) has stipulated to be repaid to his patron (*patronus*) is void, so that adding the absentee, for whose benefit chiefly the obligation is sought to be established, is not of any use to ensure payment. It remains for us to inquire whether in consequence of paying the money over the man who actually made the contract can bring an action for money lent; for whenever having lent money, we stipulate for its return, there are not two obligations created but one only, an obligation made by express words (*obligatio verborum*). Clearly, if payment comes first and the stipulation follows, it cannot be said that there is any abandonment of the natural obligation (*obligatio naturalis* [82]). A further stipulation, in which he stipulated for interest without adding the name, does not labour under the same defect (for it is not to be harshly held that the interest was stipulated for on behalf of the same person to whom apparently the principal was stipulated to be repaid), and therefore a stipulation for interest is good, made through the instrumentality of a freedman (*libertus*), and he is compelled to give up receipts under it to his patron (*patronus*). For speaking generally in reference to stipulations, the words out of which the obligation is created must be

[82] See note to *Dig.* XLV. i. 1, 2 *ante*.

closely regarded. Sometimes time must be understood to be present, or a condition must be inferred from what is seen to be done ; but a person must never be considered referred to unless expressly mentioned. (3) If I have stipulated that you should remain, and if you do not remain something be given which is impossible for the person promising: when the latter stipulation is taken away the first one remains valid, and has the same effect as if I had stipulated simply that you should remain.

127. *Scaevola libro quinto quaestionum.* If a ward has promised the slave Stichus without his guardian's authorisation, and has given a surety (*fidejussor* [83]) for his delivery, but the slave has died after delay has arisen in handing him over, caused by the ward himself, the surety will not be liable for the delay of the ward ; for there is understood to be no delay arising where there is no right of action (against the principal debtor). And the surety is bound to this extent, that he may be sued while the slave is alive, or after his death if the delay complained of is caused by him.

128. *Paulus libro decimo quaestionum.* If there be two stipulators, one of whom has made a binding contract and the other a contract not binding, payment is not rightly made to him who has not got the promissor bound, because payment is made to him, not on behalf of the other man's contract, but in respect of his own, which is no contract at all. He who stipulated for the slave Stichus or the slave Pamphilus is for the same reason, not rightly paid if the obligation is binding with regard to one (only) because the other was, though he had ceased to be, the stipulator's, for both are included in the obligation and not in the payment.

129. *Scaevola libro duodecimo quaestionum.* If anyone has made the following stipulation : " You give ten *aurei* if the ship comes home and Titius is made consul ? " (*Decem aureos das, si navis venit et Titius consul factus est ?*) payment is only due if each of these things happens. The same thing applies in the contrary case : " Do you undertake to give, if the ship does not come home and

[83] See *Gai.* III. 115 *et seq.*

Titius is not made consul ? " (*Dare spondes, si nec navis venit nec Titius consul factus sit ?*). It is required that neither of these things should happen. If the form be : " if neither the ship comes home nor Titius is made consul ? " (*si neque navis venit neque Titius consul factus est ?*) it is just the same. But if it be in this form : " Will you give if the ship comes home or Titius is made consul ? " (*Dabis, si navis, venit aut Titius consul factus sit ?*) it is sufficient that one of these events happens. And in the contrary case : " Will you give, if the ship does not come home or Titius is not made consul ? " (*Dabis, si navis non venit aut Titius consul factus non est ?*) it is sufficient that one of these events does not happen.

130. *Paulus libro quinto decimo quaestionum.* The saying that a father stipulates validly for his son, just as if the latter had stipulated for himself, is true with regard to stipulations which refer to a *jus*, and for subjects which can be acquired by the father ; but it is otherwise if the stipulation is to bestow a *res facta* on the son, for then it will be invalid, as, for instance, that he may be permitted to retain or that he may have, rights-of-way (*tenere*[84] *ei vel ire agere*[85] *liceat*). On the other hand the son acquires on his father's behalf even by stipulating for a right-of-way for him (*ut ire*[85] *patri liceat*) ; in fact he can acquire for his father rights which he cannot acquire for himself.

131. *Scaevola libro tertio decimo quaestionum.* Julian has written, if I stipulate " nothing shall be done by you or by your heir Titius to obstruct my rights-of-way " (*neque per te neque per heredem tuum Titium fieri, quo minus mihi, ire liceat*) not only is Titius liable if he obstruct the way, but his co-heirs also. (1) He who stipulates that a farm be given to himself or to Titius can, although the farm be delivered to Titius, none the less bring an action for the farm, in order that it may be adjudged to him by a judicial decision ; for it is to his interest to do so, for he might recover the farm from Titius on an action

[84] *Tenere* is a *res facta* ; it does not involve the idea of full legal ownership, but that of mere occupation only, and see note to *Dig.* XLV. i. 38, 6 *ante*.

[85] See *Dig.* XLV. i. 38, 6 *ante*.

of mandate (*actio mandati*). But if he introduced Titius' name with a view of making him a present, it will be at once admitted that the defendant is released from his obligation by making surrender (to Titius).

132. *Paulus libro quinto decimo quaestionum.* A certain man, while bringing up as his own another man's son, promised a certain sum of money to the man who entrusted him with his upbringing if he treated him otherwise than as a son. I ask whether the stipulation is broken if he has subsequently driven him out of the house, or has died and left him nothing by will; and does it make any difference whether the son was a foster-child or a cognate relative of the man so acting. Further, I ask if anyone has given his own son in adoption by the statutory process (*legitime*), and the stipulation, as above set out, has been made, and the adopted father (*pater adoptivus*) has disinherited him or has emancipated him, whether the stipulation is broken. The answer is the stipulation is binding in both cases; therefore, if anything contrary to the agreement is done, the stipulation is broken. Let us first examine the case with regard to him who has adopted the boy by statutory adoption, as to whether the stipulation can be broken if he has disinherited him or emancipated him; for a father is wont to do these things with regard to his son; therefore he does not treat him otherwise than as a son. The disinherited child may, of course, bring an action to set the will aside (*agere de inofficioso*[86]). What however must be said if he deserved to be disinherited? In the case of his emancipation it is obvious that he is deprived of this remedy. Therefore a stipulation ought to be inserted, so that, if he (the adopted father) should emancipate or disinherit the boy, he should promise to pay a certain sum. In that event however, after the stipulation is broken, it may be questioned whether the disinherited son ought to be permitted to sue to set the

[86] An action *de inofficioso testamento* could be brought when descendants were omitted from a will or disinherited by their ascendants; if the omission or disherison was unjust the will was set aside and became void, and the property passed on as an intestacy.

will aside (*dicere de inofficioso*). And particularly whether if he becomes heir to his natural father, an action on the stipulation ought to be denied him after his suit to set aside the will has failed? For if a claim to money lent ought not to be denied the stipulator when the son was defeated in his action, neither should it be denied to the son himself. But with regard to him who has not actually adopted the boy, I do not see what meaning is to be given to these words: "if he treats him otherwise than as a son" (*si eum aliter quam ut filium observasset*). Are we in this case to regard disherison or emancipation as extraneous and irrelevant? But if he who has made a statutory adoption (*legitime*) does not infringe the wording of the stipulation when he exercises his paternal jurisdiction over one who has not done these things, the words he has spoken are surplusage; yet it could be said that the stipulation is broken. (1) A son subject to the paternal jurisdiction (*filius familias*) stipulated as follows: "Will you be security for whatever sum of money I shall lend to Titius?" (*Quantum pecuniam Titio credidero, fide tua esse jubes?* [87]), and after he was emancipated he lent money (to Titius): the surety (*fidejussor* [87]) is not liable to the father, because the borrower (*reus*) is not liable to him.

133. *Scaevola libro tertio decimo quaestionum.* If I have stipulated in the following form: "Do you undertake neither you nor your heir shall do me violence?" (*Neque per te neque per heredem tuum vim fieri spondes?*) and I have brought an action against you because you have been violent to me, anything done by your heir rightly remains covered by the contract. For the stipulation can be broken by a later act of violence by the promissor, and it does not refer to one act of violence only. For as both the promissor and his heir are included, so the violence of the former, even often repeated, is covered by the contract, so that he may be made liable to the extent of the damage caused. Or if we wish the stipulation to be made: "neither you nor your heir shall do me violence?" (*neque per te neque per heredem tuum fieri?*)

[87] See *Gai.* III. 115 *et seq.*

so that it is binding with regard to the first act of violence only; if the promissor has done violence the stipulation could not be broken any more by the violence of the heir; therefore if action was brought as if it were in respect of the promissor's acts, the whole contract would be used up; and this is not true.

134. *Paulus libro quinto decimo responsorum.* Titia, who had a son by her first husband, married Gaius Seius, who had a daughter; and at the time of their marriage they agreed that the daughter of Gaius Seius should be engaged to Titia's son, and a contract was drawn up and a penalty added if anyone made any hindrance to their marriage; subsequently, after the marriage was consummated, Gaius Seius died, and his daughter was unwilling to marry Titia's son. I ask whether the heirs of Gaius Seius are liable on the stipulation. He answered that the plaintiff, suing on the stipulation set out above, would be met with a defence of fraud, since it is not made in accordance with good morals, because it is thought to be a shameful thing that a marriage, whether in the future or already contracted, should be enforced by an agreed penalty. (1) He answered too: very often those things are accepted as agreed in the recitals, and even thought repeated in stipulations, but in such a manner that the stipulation is not made void by this repetition. (2) He further answered: when Septicius promised in writing that he would pay the money which was deposited at Sempronius' house, and interest at the rate of 6 *per centum*: if the agreement was made between parties present it must be understood the words of the stipulation on behalf of Lucius Titius came first. (3) In still another answer he said: whenever one stipulation is specially substituted for a series of agreements, although one question and one answer is substituted, yet it is to be held as if each specific agreement was brought within the stipulation.

135. *Scaevola libro quinto responsorum.* If anyone has promised in this form: "I will give you ten on the day you ask me, and interest thereon for thirty days" (*decem tibi dabo, qua die petieris, et eorum usuras in dies triginta*) I ask whether the interest is owing from the day when the

contract was made or from the day on which the principal was claimed. He answered that on these facts interest is owed from the day when the contract was made, except if some other agreement was clearly come to. (1) A question also arises as to when I am bound to return money promised "when first claimed" (*cum primum petierit*). He answered: the words set out above are binding from the day when the stipulation was made. (2) Seia agreed with Lucius Titius, because she had bought some gardens to his order (*eo mandante*[88]), that as soon as she should receive from him the whole price with interest she would make over the property in the gardens to him: it is next immediately agreed between them both, that the *mandator* (Lucius Titius) should pay the whole sum and receive the gardens before the 1st of April next ensuing. It is asked whether, inasmuch as the whole price with interest, was not paid by Lucius Titius to Seia before the 1st of April, but shortly after Titius was prepared to pay Seia the rest of the price with interest and Seia was not willing to take it, so that up to the present it was not the fault of Titius that the balance was unpaid, Lucius Titius can none the less sue on the contract if he is prepared to pay Seia the whole of the money. He answered that he can so sue if he had made his offer not very long after the appointed day and the woman's interests did not suffer at all by reason of that delay; for all the facts must be brought to the notice of the judge. (3) Titius wrote, that a slave was given and made over to him on this condition, that he should never belong to his brother, or his son, or his wife, or his father-in-law, and he promised these things on the stipulation of Seia, and after two years he left as his heirs Seia and his brother, to whom it was agreed the slave should not belong: it is asked whether Seia can sue the brother and her co-heir on the stipulation. He answered that she can sue him in so far as her interests are damaged. (4) A daughter who had commenced an action to set aside a will (*de inofficioso*[89]), and afterwards settled it with the heirs by

[88] See, as to *mandatum, Dig.* XLV. i. 121, 3, note *ante.*
[89] See *Dig.* XLV. i. 132, note *ante.*

agreeing to a stipulation and including a clause against fraud, brought an action before the prefect on the ground that the will was forged, and failed to prove it: I ask whether she can be sued on the clause against fraud. The answer is that nothing which may be represented as done subsequently has any effect on that stipulation.

136. *Paulus libro quinto sententiarum.* If something with different names, which is the subject of a stipulation, is called by one name, the contract is not rendered unenforceable if the other party uses the other name. (1) If a man who has stipulated that a right-of-way (*via* [90]) to his farm be given him, subsequently sells the farm, or a part of it before the easement is created, the stipulation comes to nothing.

137. *Venuleius libro primo stipulationum.* The acts of stipulating and promising ought to be successive, and (though a natural pause may intervene) the stipulator ought to be answered immediately, for otherwise, if after the question he has made some other communication, nothing comes (of the stipulation), even though the formal undertaking is given on the same day. (1) If I have stipulated for a slave, and I am thinking of one slave and you of another, nothing is accomplished; for a stipulation is perfected by the consent of both parties. (2) If I have stipulated: "it shall be paid at Ephesus?" (*Ephesi dari?*) time for performance is implied; but how much ought to be allowed is a matter of dispute. And the better course is, that we should refer the whole matter to an arbitrator (*judex*), that is to say, to an upright man, who shall estimate in what time a careful *paterfamilias* could accomplish what the promissor promised he would do, so that he who undertook that he would pay at Ephesus should neither be compelled to travel both day and night, and regardless of all bad weather, nor allowed to proceed in too leisurely a fashion, so as to seem worthy of censure, but that regard should be given to weather, age, sex, and the health of the promissor when he is carrying out the promise, so that he may arrive in good time, that is to say, in such time as the majority of men usually take under similar

[90] See *Dig.* XLV. i. 38, 6, note *ante*.

conditions. And after this has been done, although the promissor remained at Rome, and could not pay the money at Ephesus, he will of course be rightly sued, either because it was his own fault that he did not pay at Ephesus, or because he could have paid at Ephesus by means of an agent, or because he might pay anywhere; for what is owed on a particular day may be paid, although it cannot be sued for, beforehand. But if, travelling day and night, or by a lucky journey the promissor reached Ephesus in less time than usual, he is immediately liable on his contract, for there is no room for doubt in reference to a matter, that as regards both the time needed and the act to be accomplished, is already completed. (3) So too, the man who undertook to build a tenement house, ought not to hurry with stone masons collected on all sides and a large number of labourers employed, nor, on the other hand, should he be content with anything but following the procedure of a careful builder. He should be methodical both with regard to time and situation. And so if the work is not commenced, only what could have been carried out in that interval of time must be estimated. And if the promissor, after the time has passed in which he ought to have completed the house, subsequently builds it, he is released, just as he who undertook to give something is released if he has handed it over at some time or other. (4) It must be considered too, whether the man who has promised that 100 should be given is liable immediately, or whether the obligation is suspended until he can get the money together. What then happens if he has not the money at home and cannot find a lender? But some natural delay is allowed and the ability to pay is regarded. And the ability referred to is the convenience or inconvenience of the promissor, and not the convenience or inconvenience of the things which were promised. Yet on the other hand if anyone has undertaken that the slave Stichus be given, we may want to know where Stichus is: or if, promising "that he will pay at Ephesus" (*Ephesi daturum se*), the promissor does not seem to regard much whether he is undertaking to give something that is at Ephesus when he himself is at Rome, or not; for the

also refers to ability to pay, since both with regard to the money and to the slave Stichus it is common ground, that the promissor is not able to give at the present time. And speaking generally, difficulty of payment causes injury to the promissor, and is no drawback to the stipulator; otherwise it would be said that the man who promised to give another man's slave, whom his owner is unwilling to sell, is unable to perform his contract. (5) If I have stipulated with a man, who is unable to carry out his contract, though it is a possible contract for another man, Sabinus writes that the obligation is binding in law. (6) When anyone has stipulated under this condition, "if Titius should have sold sacred or holy property" (*rem sacrem aut religiosam*[91]), or a market-place, or a church, or anything of that sort, which is dedicated to public uses in perpetuity: where a condition cannot be legally carried out at all or the promissor is not permitted to do it, a stipulation will have no binding force, just as if a condition had been inserted which was by nature impossible of performance. And that the law can be changed, and that what is now impossible subsequently be made possible, does not affect the matter; for the construction to be put upon a stipulation ought not to depend on the law of the future, but ought to depend on the law in use at the time of contracting. (7) If we stipulate to secure the performance of some act, Labeo says that it is a more usual and neater form to provide for a penalty for breach in this way: "if it shall not be so performed" (*si ita factum non erit*); but when we stipulate to prevent something being done, then this is the method to adopt: "if anything contrary to this is done" (*si adversus ea factum erit*); and when we stipulate to secure performance of one thing, and to prevent another being done, in one and the same stipulation, it must be included in the following way: "if you do not perform, if you do anything contrary to it" (*si non feceris, si quid adversus ea feceris*). (8) It should be made known, moreover, that what we stipulate should be paid cannot be acquired for one of our heirs, but is necessarily acquired for all; but when we stipulate that

[91] See *Gai.* II. 4 *ante.*

anything is to be done, we may properly refer to one individual heir.

138. *Idem libro quarto stipulationum.* Sabinus says that he who stipulates for payment on the days of a certain market (*nundinae*[92]) can sue on the first day; but Proculus and the other leaders of the opposite school think the promissor cannot[93] be sued, as long as a little time is left over out of the days allotted for the market. And I agree with Proculus. (1) If I stipulate without any condition that this thing or that shall be given, you may change your mind as to which you will pay as often as you like, because the case of an expressed wish is different from one that is implied.

139. *Idem libro sexto stipulationum.* When we formally claim something on a stipulation for double price, the heirs of the vendor ought all to be summoned together, and all of them ought to appear, and on default of any one of them appearance will avail the others nothing, because the sale, which is indivisible in its nature, ought to be defended by them altogether. But since by the default of one all the others are considered to have made default, all are therefore liable, and payment is due from each of them in proportion to his share of the inheritance.

140. *Paulus libro tertio ad Neratium.* When after very many things have been referred to, a stipulation is made in the following form: "all those things, which have been written down above, to be given?" (*ea omnia, quae supra scripta sunt, dari?*) it is more accurate to say that there are as many stipulations as there are things referred to. (1) In reference to this stipulation: "this money to be given each day, this day, annually, biennially, triennially?" (*annua, bima, trima, die id argentum quaque die dari?*) there was a difference of opinion among the ancient lawyers. *Paulus*: the truer opinion is that there are here three stipulations for three sums of money. (2) It was even held that the obligation was extinguished, if it happened to

[92] The market day was held every ninth day (hence the name *nundinae*), and sometimes lasted several days.

[93] In some readings of the text "not" is omitted; its insertion, however, seems to give the more intelligible rendering.

be in a position from which it could never have arisen, though this is not true in every case. For a partner in a farm owned in common cannot stipulate for rights-of-way (*viam iter actum*[94]) to it, yet if the man who has made that stipulation has left two heirs, the stipulation is not extinguished. And an easement cannot be acquired through one of the owners, though once acquired one of them can retain it; this happens if part of the servient tenement becomes the property of the owner of the dominant tenement.

141. *Gaius libro secundo de verborum obligationibus.* If a slave or a son subject to the paternal jurisdiction (*filius familias*) has stipulated in the following form: "this thing or that, whichever I choose?" (*illam rem aut illam, utram ego velim?*) not the father or the owner, but the son or the slave ought to determine which of them. (1) So too, if a third person is referred to, as, for instance, in this way: "whichever of them Titius shall choose" (*utram earum Titius elegerit*) the stipulator has only the right to claim one or the other if Titius has exercised his choice. (2) Although a ward (*pupillus*) can make a valid stipulation as soon as he can speak, yet a son subject to the paternal jurisdiction is not even under obligation when he acts on his father's authorisation. After the age of puberty however a man subject to the paternal jurisdiction (*potestas*) is by custom considered to be liable, just as if he were the father (*paterfamilias*). What we have said in reference to a ward (*pupillus*) must be also understood to apply to a daughter subject to the paternal jurisdiction (*filia familias*) and under the age of puberty. (3) If I have stipulated as follows: "to me or to Titius?" (*mihi aut Titio?*), and you undertake to pay to me, according to all the authorities you answer to what was asked, since it is agreed that the obligation is acquired for me only, although payment may be rightly made to Titius. (4) If such a stipulation as the following is made between parties who are in Rome: "Do you undertake to pay to-day at Carthage?" (*Hodei Carthagine dare spondes?*) some authorities think the contract does not necessarily

[94] See *Dig.* XLV. i. 38, 6, note *ante*.

refer to an impossible state of affairs, because it may happen that both the stipulator and the promissor had some time previously each informed his own agent that a stipulation would be made on that day, and also that the promissor had instructed his agent to make payment and the stipulator had instructed his to receive payment; and if the matter had been so arranged the stipulation could be validly made. (5) When I stipulate "to me or to Titius" (*mihi aut Titio*) it is said that one particular thing cannot be indicated for me and another for Titius; as, for instance, "ten to me or a slave to Titius" (*mihi decem aut Titio hominem*). If however, that thing is paid to Titius which was indicated as payable to him, although the promissor is not released in law, yet he can avail himself of an equitable defence (*exceptio*) (if sued). (6) But payment at different times can, however, be indicated, as for instance, "to me on the 1st of January, or to Titius on the 1st of February?" (*mihi kalendis Januariis aut Titio kalendis Februariis?*), and even the earlier date can be fixed with regard to paying Titius, as for example, "to me on the 1st of February, to Titius on the 1st of January?" (*mihi kalendis Februariis, Titio kalendis Januariis?*), in which case we understand the stipulation to be such as this: "If you do not pay Titius on the 1st of January, do you undertake to pay me on the 1st of February?" (*Si Titio kalendis Januariis non dederis, mihi kalendis Februariis dare spondes?*). (7) And further I can even stipulate for payment to myself without condition or to Titius conditionally. In the contrary case however, to myself conditionally or to Titius without condition, the whole stipulation will be void, unless the condition affects me personally, probably because, unless the contract is binding in reference to me, the addition can have no validity. Yet this can only be treated in this way if it clearly appears that Titius was added unconditionally; it is otherwise if I stipulate thus: "Do you undertake to pay to me or to Titius, if the ship comes home from Africa?" (*Si navis ex Africa venerit, mihi aut Titio dari spondes?*), for it appears that Titius is also included under the same condition. (8) From this it appears that if one

condition is added for me, and a different one for Titius, and the condition does not affect me personally, the whole stipulation will be entirely valueless; if however, my condition is outstanding, and the condition in reference to Titius is fulfilled, Titius can be paid; if however, the condition with regard to him has failed, it is regarded as though it had not been added. (9) From all these things it is apparent that although a third party may not be strictly included, the stipulation is none the less effectual with regard to ourselves.

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THE RIVERSIDE PRESS LIMITED. EDINBURGH.